

**UNITED STATES – MEASURES CONCERNING THE IMPORTATION,
MARKETING AND SALE OF TUNA AND TUNA PRODUCTS**

(WT/DS381)

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	PROCEDURAL BACKGROUND.....	3
III.	FACTUAL BACKGROUND.....	3
A.	U.S. Dolphin Safe Labeling Provisions.....	4
1.	Statute	4
2.	Regulations.	9
3.	Court Decision.....	9
4.	GATT panel report.....	10
B.	Tuna Dolphin Issue.	11
1.	ETP and setting on dolphins to catch tuna.....	11
2.	Adverse impact of setting on dolphins to catch tuna.....	15
(a)	Depleted dolphin populations.	15
(b)	Adverse effects on dolphins.....	17
(c)	Bycatch.....	20
3.	Fishing techniques other than setting on dolphins.....	22
(a)	Sets on free swimming schools of tuna.	22
(b)	Sets on floating objects.	22
(c)	Other methods.	23
4.	U.S. efforts to protect dolphins and other marine species.....	23
5.	The Panama Declaration, AIDCP and US actions in accordance with them	25
C.	Market for Tuna Products.	29
1.	Mexican Tuna Market.	29
2.	U.S. Tuna Market.....	30
IV.	LEGAL ARGUMENT.....	32
A.	Introduction	32
B.	The U.S. dolphin safe labeling provisions are not inconsistent with the GATT	33
1.	The U.S. dolphin safe labeling provisions are not inconsistent with GATT Article III:4.....	33
(a)	The U.S. provisions do not modify the conditions of competition because all tuna is subject to the same conditions on use of the dolphin safe label.....	34
(b)	The U.S. provisions do not afford less favorable treatment to Mexican tuna or tuna products.....	34
(c)	Mexico does not provide sufficient evidence to support its GATT Article III:4 claim.....	36

2.	The U.S. dolphin safe labeling provisions are not inconsistent with GATT Article I:1.....	38
C.	The U.S. dolphin safe labeling provisions are not inconsistent with the TBT Agreement.	39
1.	The U.S. dolphin safe labeling provisions are not technical regulations and therefore not subject to Article 2 of the TBT Agreement.	39
2.	The U.S. measures are not inconsistent with Article 2.1 of the TBT Agreement.	45
3.	The U.S. dolphin safe labeling provisions are not inconsistent with Article 2.2 of the TBT Agreement.....	46
(a)	The U.S. dolphin safe labeling provisions are to fulfill a legitimate objective.....	47
(i)	Preventing consumer deception and protecting dolphins are legitimate objectives.	48
(ii)	The U.S. dolphin safe labeling provisions are to fulfill a legitimate objective.	49
(b)	The U.S. dolphin safe labeling provisions are not more trade-restrictive than necessary to fulfill a legitimate objective.	51
4.	The U.S. dolphin safe labeling provisions are not inconsistent with Article 2.4 of the TBT Agreement.....	55
(a)	The definition of “dolphin safe” in the AIDCP tuna tracking resolution is not a relevant international standard.	56
(i)	The definition in the AIDCP tuna tracking resolution is not a standard.....	57
(ii)	The definition in the AIDCP tuna tracking resolution is not international.	58
(iii)	The definition in the AIDCP tuna tracking resolution is not relevant.....	59
(b)	The definition of “dolphin safe” in the AIDCP tuna tracking resolution would not be effective or appropriate to fulfill the objectives of the U.S. dolphin safe labeling provisions.....	60
V.	CONCLUSION.....	62

TABLE OF REPORTS

Short Form	Full Citation
<i>Australia – Salmon (AB)</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998
<i>Brazil – Tyres (AB)</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007
<i>Dominican Republic – Cigarettes (AB)</i>	Panel Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/AB/R, adopted 19 May 2005
<i>EC – Asbestos (AB)</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Products Containing Asbestos</i> , WT/DS135/AB/R, adopted 5 April 2001
<i>EC – Geographical Indications (Australia)</i>	Panel Report, <i>European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs; Complaint by Australia</i> , WT/DS290/R, adopted 20 April 2005
<i>EC – Sardines (Panel)</i>	Panel Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/R and Corr.1, adopted 23 October 2002, as modified by the Appellate Body Report, WT/DS231/AB/R
<i>EC – Sardines (AB)</i>	Appellate Body Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/AB/R, adopted 23 October 2002
<i>Korea – Beef (AB)</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001
<i>US - Tuna Dolphin I (Mexico)</i>	GATT Panel Report, <i>United States – Restrictions on Imports of Tuna</i> , 3 September. 1991, unadopted, BISD 39S/155

I. INTRODUCTION

1. The measures at issue in this dispute establish conditions under which the voluntary “dolphin safe” label may be used on tuna products. These conditions do not allow tuna products to be labeled dolphin safe if they contain tuna that was caught by intentionally encircling and deploying purse seine nets on dolphins. This fishing technique is commonly referred to as “setting on dolphins” and involves chasing, encircling and deploying purse seine nets on dolphins to catch tuna that swim beneath the dolphins. The U.S. measures apply to tuna caught in any fishery where there is a regular and significant association between tuna and dolphins and apply regardless of the origin of the tuna. The only known fishery where there is a regular and significant association between tuna and dolphins is the Eastern Tropical Pacific Ocean (ETP).

2. Setting on dolphins to catch tuna has well-documented adverse impacts on dolphins in the ETP. Not only are dolphins killed when encircled with purse seine nets to catch tuna (e.g., over 1000 dolphin were observed killed in sets with purse seine nets in 2009), but research indicates that setting on dolphins to catch tuna causes a number of other adverse effects on dolphins, including separation of mothers and their dependent calves and reduced reproductive success due to stress. Together these adverse effects have resulted in dolphin populations in the ETP that are small fractions of their “pre-fishery” levels. Today, the population level of two main species of dolphins impacted by dolphin fishing in the ETP – northeastern offshore spotted and eastern spinner dolphins – remain at only 19 and 29 percent, respectively, of the levels that existed before setting on dolphins became the predominate technique to fish for tuna in the ETP.¹

3. The U.S. dolphin safe labeling provisions ensure that when a dolphin safe label appears on tuna products in the United States it accurately conveys to consumers that the product does not contain tuna that was caught in a manner that adversely affects dolphins. Any tuna that is caught in the ETP – including Mexican tuna – during a trip using a technique other than setting on dolphins and in a set in which no dolphins were otherwise killed or seriously injured is eligible to bear the dolphin safe label. The fundamental premise of Mexico’s claims – that the U.S. measures prohibit use of the dolphin safe label on Mexican tuna – is simply incorrect.

4. Mexico is also incorrect that the U.S. measures deny Mexico access to the U.S. market. The U.S. measures set out a voluntary labeling scheme. Mexico can and does sell tuna in the U.S. market that is not labeled dolphin safe. In 2009, for example, U.S. imports of tuna and tuna products from Mexico totaled US\$13 million. Moreover, tuna caught by one-third of Mexican purse seine vessels that fish for tuna in the ETP is already eligible for the dolphin safe label; yet Mexican processors do not to use it. It is also noteworthy that Mexico is a net importer of tuna. In 2008, Mexican imports of tuna totaled over US\$ 332 million while its exports totaled only US\$ 62 million.

¹ Wade, P. R., G. M. Watters, T. Gerrodette, and S. B. Reilly. 2007. Depletion of spotted and spinner dolphins in the eastern tropical Pacific: modeling hypotheses for their lack of recovery. Marine Ecology Progress Series 343:1-14, p. 5, Exhibit US-21. (See “Model Averaged” column of table 3).

5. As detailed below, each of Mexico’s legal claims fail. First, the U.S. measures are non-discriminatory – as between Mexican and domestic tuna and between Mexican tuna and tuna of other countries. In fact, this is what a 1991 panel found under the *General Agreement on Tariffs and Trade* (GATT 1947) when concluding that U.S. dolphin safe labeling provisions were not inconsistent with Article I:1 of the General Agreement on Tariffs and Trade 1947 (GATT 1947): “The labelling regulations governing tuna caught in the ETP thus applied to all countries whose vessels fished in this geographical area and thus did not distinguish between products originating in Mexico and products originating in other countries.”²

6. Second, the U.S. measures fulfill a legitimate objective of ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught by a method that adversely affects dolphins. In addition, to the extent that consumers choose not to purchase tuna without the dolphin safe label, it fulfils an additional objective of ensuring that the U.S. market is not used to encourage fishing fleets to use fishing techniques that adversely affect dolphins and in this way contributes to protecting dolphins. Allowing tuna products to be labeled “dolphin safe” that contain tuna that was caught by setting on dolphins would not fulfill either of these objectives.

7. Mexico’s efforts to reframe the objective of the U.S. measures should be rejected. It is not for Mexico to choose for the United States which legitimate objectives it should pursue. The United States agrees that protecting the ecosystem in the ETP is an important and worthy objective. In fact, as elaborated further in Section III, the United States has in place and abides by a number of measures to that end. However, as stated, the objectives of the U.S. measures at issue in this dispute are ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught by a method that adversely affects dolphins and ensuring that the U.S. market is not used to encourage fishing fleets to use techniques that adversely affect dolphins.

8. In addition, although not relevant to the legal claims in this dispute, Mexico is incorrect that the United States failed to abide by its “commitment ... to amend its law”³ to allow tuna products that contain tuna that was caught by setting on dolphins to be labeled dolphin safe. As explained below, the United States made no such commitment. Instead, to help ensure conclusion of an international dolphin conservation agreement (what ultimately became the Agreement on International Dolphin Conservation Program or AIDCP) the U.S. executive branch indicated that it would seek to persuade the U.S. Congress (i.e., the legislative branch) to amend U.S. law to permit tuna products that contain tuna that was caught by setting on dolphins to be labeled dolphin safe, provided no dolphins were observed to be killed or seriously injured. These efforts ultimately did not succeed, in particular because it could not be established that setting on dolphins to catch tuna was not having a significant adverse impact on dolphin

² GATT Panel Report, *US - Tuna Dolphin I*, para. 5.43.

³ Mexico Submission, para. 8.

populations. Thus, the U.S. law continued to provide that the voluntary dolphin safe label may not be used on tuna products that contain tuna that was caught by setting on dolphins. This is not tantamount, as Mexico suggests, to a failure on the part of the United States to abide by an international commitment.

9. The United States agrees that the AIDCP has made an important contribution to dolphin conservation in the ETP, including that it has fostered the continued reduction in *observed* dolphin mortalities in the fishery. However, as elaborated below, this tells only part of the story. Dolphins continue to die, or be seriously injured, in the ETP as a result of setting on dolphins to catch tuna. And, their populations remain depleted in the ETP. And this is true even though the parties to the AIDCP and their fleets are generally adhering to their dolphin conservation obligations under the AIDCP. So, while the AIDCP has been successful in significantly reducing the number of observed dolphin mortalities in the ETP, dolphins continue to be adversely affected and dolphin populations have not yet demonstrated the recovery that would be expected if adverse effects of setting on dolphins to catch tuna had been completely alleviated. The United States has a right to ensure that consumers are not misled or deceived about whether tuna products contain tuna that was caught by a method that is “dolphin safe” - that is, a method that does not involve a fishing technique that adversely affects dolphins – and to ensure that the U.S. market is not used to encourage fishing fleets to use fishing techniques that adversely affect dolphins.

II. PROCEDURAL BACKGROUND

10. On October 24, 2008, Mexico requested consultations with the United States pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”) and Article XXII:1 of GATT 1994, regarding U.S. provisions pertaining to the labeling of tuna and tuna products as “dolphin safe.” This request was circulated to WTO Members on October 28, 2008 (WT/DS381/1). Pursuant to this request, the United States and Mexico held consultations on December 17, 2008. These consultations failed to result in a mutually satisfactory resolution to this dispute.

11. On March 9, 2009, the Mexico requested the establishment of a panel pursuant to Article 6 of the DSU (WT/DS381/4). The Dispute Settlement Body (“DSB”) established the Panel on April 20, 2009 with standard terms of reference.

12. On 2 December 2009, Mexico requested the Director-General to determine the composition of the panel, pursuant to paragraph 7 of Article 8 of the DSU, and on December 14, 2009 the Director-General composed the panel. Argentina, Australia, Brazil, Canada, China, Ecuador, the European Communities, Guatemala, Japan, Korea, New Zealand, Chinese Taipei, Thailand, Turkey and Venezuela have reserved third party rights in the dispute.

III. FACTUAL BACKGROUND

A. U.S. Dolphin Safe Labeling Provisions

13. Mexico challenges three measures in this dispute: (1) the Dolphin Protection Consumer Information Act, Title 16, Section 1385 of the United States Code; (2) Section 216, parts 91 and 92, of Title 50 of the Code of Federal Regulations; and (3) the 9th Circuit Court of Appeals decision in *Earth Island Institute v. Hogarth*, 494 F.3d 757 (2007). These measures ensure that when “dolphin safe” appears on tuna products⁴ it signifies that they do not contain tuna that was caught during a trip that involved intentionally setting on dolphins to catch tuna or in a set in which dolphins were killed or seriously injured. The U.S. measures apply equally to tuna products of any origin. It is the manner in which the tuna was caught that determines whether the product may be labeled dolphin safe, not the origin of the tuna or the flag of the fishing vessel that caught the tuna.

1. Statute

14. The Dolphin Protection Consumer Information Act, as amended and codified at 16 U.S.C. § 1385 (DPCIA), establishes conditions under which tuna products may voluntarily be labeled dolphin safe. Specifically, the statute states that it is a violation of U.S. laws against deceptive practices in commerce for any producer, importer, exporter, distributor or seller to falsely label⁵ tuna products “dolphin safe.” It provides that tuna products may not be labeled dolphin safe if they contain tuna that was caught during a fishing trip in which purse seine nets were intentionally deployed on or used to encircle dolphins or dolphins were killed or seriously injured in the set in which the tuna was caught.⁶ These conditions are set out in Section 1385(d)(1) read together with Section 1385(d)(2) and (h)(2) and apply regardless of where the tuna was caught or the flag of the vessel that caught the tuna. The documentary evidence required to establish that no dolphins were killed or seriously injured or that no purse seine nets were intentionally set on dolphins to catch the tuna varies depending on whether there is a regular and significant association between tuna and dolphins in the fishery in which the tuna was caught.⁷

⁴ Tuna products are defined as “a food item which contains tuna and which has been processed for retail sale, except perishable sandwiches, salads, or other products with a shelf life of less than 3 days.” DPCIA, 16 U.S.C. § 1385(c)(5), Exhibit US-5. Tuna products include canned or pouched tuna, whole frozen tuna, frozen tuna steaks, frozen tuna filets, tuna loins for canning, tuna in glass jars, tuna burgers, fish balls and fish cakes that contain tuna, and sushi grade frozen tuna. Exhibit US-X (HS codes for “tuna products”). For purposes of the DPCIA, “tuna” includes all species that are generally considered tuna including yellowfin, skipjack, albacore, bigeye and bluefin.

⁵ The DPCIA defines a label as “a display of written, printed, or graphic matter on or affixed to the immediate container of any article. DPCIA, Section 1385(c), Exhibit US-5.

⁶ It also provides that the dolphin safe label may not be used if the tuna product contains tuna that was caught on the high seas by a vessel engaged in driftnet fishing. DPCIA, 16 U.S.C. § 1385(d)(1)(A), Exhibit US-5. Mexico’s claims do not concern this provision.

⁷ DPCIA, Section 1385(d)(1), Exhibit US-5.

15. For those fisheries where there is a regular and significant association of tuna and dolphins, tuna may not be labeled dolphin safe unless the captain of the vessel and an observer participating in a national or international program certify that no purse seine net was intentionally deployed on or used to encircle dolphins during the trip in which the tuna was caught and no dolphins were killed or seriously injured in the set in which the tuna was caught. This condition applies to tuna caught using purse seine nets in the ETP where there is a regular and significant association between tuna and dolphins, as well as to tuna caught using purse seine nets in any other fishery where such an association occurs.

16. Thus, Section 1385(d)(1)(C) together with Section 1385(d)(2) and (h)(2)⁸ provide that tuna caught in the ETP may only be labeled dolphin safe – with the exception noted below – if the captain of the vessel and an independent AIDCP-approved observer certify that no purse seine nets were intentionally deployed on or used to encircle dolphins during the trip in which the tuna was caught and no dolphins were killed or seriously injured in the set in which the tuna was caught. The exception to this is that tuna caught in the ETP by vessels smaller than 363 metric tons carrying capacity may be labeled dolphin safe without any documentary evidence,⁹ as vessels smaller than 363 metric tons are prohibited from setting on dolphins to catch tuna.¹⁰

17. Likewise, Section 1385(d)(1)(B)(i) provides that tuna caught using purse seine nets in any other fishery where there is a regular and significant association between tuna and dolphins may only be labeled dolphin safe if the captain of the vessel and an observer participating in a national or international program approved by the Secretary of Commerce certify that no purse seine net was intentionally deployed on or used to encircle dolphins during the trip in which the tuna was caught and no dolphins were killed or seriously injured in the set in which the tuna was caught. Similarly, Section 1385(d)(1)(D) provides that tuna caught using methods that do not involve purse seine nets in a fishery where there is a regular and significant mortality or serious injury of dolphins may only be labeled dolphin safe if the captain of the vessel and an observer participating in a national or international program approved by the Secretary of Commerce certify that no dolphins were killed or seriously injured in the set or other gear deployments in which the tuna was caught.

⁸ The reason Section 1385(h)(2) applies to tuna caught in the ETP, rather than Section 1385(h)(1) which only requires a certification that no dolphins were killed or seriously injured in the set in which the tuna was caught, is explained below.

⁹ DPCIA, 16 U.S.C. § 1385(d)(2)(A), Exhibit US-5; see also 50 CFR § 216.91(a)(1), Exhibit US-23B (setting out that 362.8 metric tons may be labeled dolphin safe without the documentary evidence required of large purse seine vessels).

¹⁰ At the time the AIDCP was entered into, vessels smaller than 363 metric tons carrying capacity were considered too small to be capable of deploying purse seine nets on or to encircle dolphins, and the AIDCP prohibited them from doing so. AIDCP, Annex VIII, Exhibit Mex-11. This prohibition is reflected in U.S. regulations at 50 CFR 216.24(a)(2)(i), Exhibit US-23B.

18. As explained more below, there is no other fishery in the world for which there is a known regular and significant association between tuna and dolphins; however, should such an association ever be established, as elaborated above, the DPCIA would condition use of the dolphin safe label on provision of the same type of documentary evidence with respect to tuna caught using purse seine nets in that fishery as it does with respect to tuna caught using purse seine nets in the ETP.

19. For tuna caught in a fishery where there is no regular and significant association between tuna and dolphins or no regular and significant mortality or serious injury of dolphins, Section 1385(d)(1)(B)(ii) provides that the dolphin safe label may only be used if the captain of the vessel certifies that no purse seine nets was intentionally deployed on or used to encircle dolphins during the trip in which the tuna was caught.

20. As indicated above, Section 1385(h)(2) sets out the relevant certification for tuna caught using purse seine nets in the ETP: no purse seine nets were intentionally deployed on or used to encircle dolphins during the trip in which the tuna was caught and no dolphins were killed or seriously injured in the set in which the tuna was caught. Section 1385(h)(1) sets out an alternative certification for tuna caught using purse seine nets in the ETP: no dolphins were killed or seriously injured in the set in which the tuna was caught. Section 1385(h)(2) indicates, however, that the Section 1385(h)(2) certification shall remain the applicable certification until the Secretary of Commerce makes certain findings set out in Section 1385(g).

21. Section 1385(g) required the Secretary of Commerce to make an initial finding by March 31, 1999 and a final finding, by December 31, 2002, as to “whether the intentional deployment on or encirclement of dolphins with purse seine nets was not having a significant adverse impact on any depleted dolphin stock in the [ETP].”¹¹ Section 1385(g) required the Secretary of Commerce to base these findings on three statutorily prescribed studies and any other relevant information.¹² The three studies were:

- a) a review of relevant stress-related research and a 3-year series of necropsy samples from dolphins obtained by commercial vessels;
- b) a 1-year review of relevant historical demographic and biological data related to dolphins and dolphin stocks referred to in paragraph (1); and

¹¹ DPCIA, 16 U.S.C. § 1385(g) and (h), Exhibit US-5.

¹² The International Dolphin Conservation Program Act amended the MMPA to require the Secretary of Commerce to conduct these studies. This requirement is codified at 16 U.S.C. § 1414a(a). IDCPA, Exhibit US-23A.

c) an experiment involving the repeated chasing and capturing of dolphins by means of intentional encirclement.¹³

22. The Secretary of Commerce issued both initial and final findings called for under Section 1385(g); however those findings were vacated by the U.S. courts.¹⁴ Mexico cites as one of the three measures it challenges in this dispute the Ninth Circuit Court of Appeal’s decision in *Earth Island Institute v. Hogarth*. This is the final court decision issued concerning the Secretary of Commerce’s findings and the one that vacated the Secretary of Commerce’s final finding under Section 1385(g). As a result of the U.S. court decisions the findings necessary for the Section 1385(h)(1) certification to apply do not exist, and therefore the applicable certification for tuna caught using purse seine nets in the ETP remains the one set out in Section 1385(h)(2).

23. In this regard, the table included in paragraph 139 of Mexico’s submission omits the provisions of the DPCIA that apply to other fisheries where there is a regular and significant association between tuna and dolphins. Mexico’s table instead compares the provisions that apply to tuna caught using purse seine nets in fisheries where there is no regular or significant association between tuna and dolphins with the provision that applies to tuna caught using purse seine nets in the ETP, where not only is there a regular and significant association between tuna and dolphins but one where that association is commercially exploited on a regular and wide scale to catch tuna and where there are well-documented significant adverse impacts on dolphins resulting from that intentional exploitation. This is not a valid comparison.

24. In fisheries where there is no regular and significant association between tuna and dolphins, it is not possible to exploit dolphins on a commercial basis to catch tuna and conditioning use of the dolphin safe label on certifications from observers participating in a national or international program approved by the Secretary of Commerce that no purse seine nets were set on dolphins to catch tuna would be unwarranted. Moreover, because there is no regular and significant association between tuna and dolphins, the possibility that dolphins may be killed or seriously injured while catching tuna is *de minimis* as compared to that possibility in the ETP where dolphins are intentionally chased and encircled to catch tuna. Nonetheless, the DPCIA conditions use of the dolphin safe label on tuna products that contain tuna caught in any purse seine fishery outside the ETP on the tuna being accompanied by a signed captain’s statement certifying that the vessel did not intentionally encircle dolphins during the fishing trip in which the tuna was caught. Conditioning eligibility for the dolphin safe label on a certification

¹³ IDCPA, 16 U.S.C. § 1414a(a), Exhibit US-23A.

¹⁴ *Earth Island Institute v. Hogarth*, 484 F.3d 1123 (9th Cir. 2007), Exhibit Mex-31 (affirming the finding of the District Court, which ordered the Secretary of Commerce to vacate - that is render something to be without effect -- his final finding of no significant adverse impact under the DPCIA, resulting in a labeling standard for tuna harvested in the ETP to revert to no intentional encirclement during the trip, no death or serious injury during the set in which the tuna were caught); *Brower v. Evans*, 257 F.3d 1058 (9th Cir. 2001), Exhibit Mex-28 (affirming finding of the District Court that overturned the Secretary’s “initial finding” under the DPCIA).

that no dolphins were killed or seriously injured for tuna caught in a fishery where there is no known association between tuna and dolphins would also not warranted.

25. The DPCIA (Section 1385(d)(3)) directs the Secretary of Commerce to develop an official mark that may be used to label tuna products as dolphin safe. The DPCIA permits the use of alternative marks and these alternative marks are the marks widely used in the U.S. market.¹⁵ These marks typically consist of an image of a dolphin inside a circle with the words “dolphin safe”. Tuna product bearing the official mark may not bear any other mark or label that refers to dolphins, porpoises, or marine mammals.¹⁶

26. The DPCIA was enacted in 1990.¹⁷ The current version of the DPCIA and the version summarized above reflect amendments enacted in 1997. The key difference between the 1990 and 1997 versions of the DPCIA is the inclusion in the 1997 version of the possibility of allowing the dolphin safe label to be used on tuna products that contain tuna that was caught by setting on dolphins, provided initial and final findings of the Secretary of Commerce concluded that setting on dolphins to catch tuna was not having a significant adverse effect on dolphin populations.

27. In enacting the DPCIA, the U.S. Congress made the following findings relevant to this dispute:

(1) dolphins and other marine mammals are frequently killed in the course of tuna fishing operations in the eastern tropical Pacific Ocean....

...

(3) consumers would like to know if the tuna they purchase is falsely labeled as to the effect of the harvesting of the tuna on dolphins.¹⁸

28. These findings demonstrate that the DPCIA was enacted to address two issues: consumers’ interest in having accurate information about whether the tuna products they are considering purchasing contain tuna that was caught in a manner harmful to dolphins and a desire to contribute to the protection of dolphins that were being harmed in the course of fishing operations in the ETP. The DPCIA therefore establishes conditions under which tuna products

¹⁵ In this regard, contrary to the suggestion in paragraph 111 of Mexico’s submission, the U.S. Government does not “approve” dolphin safe labels nor require that dolphin safe labels conform to the Department of Commerce dolphin safe label. Retailers and producers are free to use their own dolphin safe logos, provided the tuna products meet the conditions to be labeled dolphin safe under the DPCIA.

¹⁶ DPCIA, 16 U.S.C. § 1385(d)(3)(B), Exhibit US-1.

¹⁷ The DPCIA as originally enacted in 1990 is set out in Title IX of Public Law 101-627, 104 Stat. 4436 (November 28, 1990), Exhibit US-8.

¹⁸ DPCIA, 16 U.S.C. § 1385(b).

may be labeled dolphin safe that ensure that consumers are not misled or deceived about whether the product contains tuna that was caught in a manner that adversely affects dolphins and that the U.S. market is not used to encourage fishing fleets to set on dolphins.

29. As noted, the U.S. Congress amended the DPCIA in 1997. These amendments were enacted in response to U.S. efforts to conclude the AIDCP. These efforts are further elaborated in Section III.B.5 below. Statements from members of the U.S. Congress at the time it enacted the 1997 amendments, as well as from the President signing the Act into law, evidence that the purpose of the DPCIA continued to be providing consumers accurate information about whether tuna products contain tuna that was caught in a manner harmful to dolphins and contributing to the protection of dolphins.¹⁹

30. Importantly, nothing in the legislative history of the original 1990 or 1997 amendments to the DPCIA (and Mexico cites none) evidences intent by the U.S. Congress to discriminate against Mexico or any other country with respect to the U.S. dolphin safe labeling provisions. The focus of the legislators, as reflected in the DPCIA, remained to ensure consumers are not misled or deceived about whether tuna products contain tuna caught in a manner that adversely affects dolphins, and to protect dolphins.

2. Regulations

31. Regulations pertaining to the use of the dolphin safe label are set out in the U.S. Code of Federal Regulations (CFR). Mexico challenges the provisions set out at 50 CFR 216.91 and 216.92. These provisions reflect the conditions for use of the dolphin safe label on tuna products set out in the DPCIA. Consistent with the DPCIA, section 216.91 sets out conditions for use of the dolphin safe label based on whether the tuna was caught in a fishery where there is a regular and significant association between tuna and dolphins or regular and significant mortalities or serious injury of dolphins.²⁰ Section 216.91 also clarifies that these conditions only apply to vessels in the ETP that have a carrying capacity greater than 362.8 metric tons²¹, and section 216.92 contains provisions to ensure that tuna caught by such vessels is labeled dolphin safe only if the conditions set out in the DPCIA have been met. Section 216.92 sets out the provisions applicable to domestic and imported tuna separately, although the basic requirements are the same and seek to ensure that claims that tuna is dolphin safe comply with U.S. law.

3. Court Decision

¹⁹ See, e.g., White House Press Release, 15 August 1997, Exhibit US-42.

²⁰ 50 CFR § 216.91, Exhibit US-2.

²¹ 50 CFR § 216.91(a)(1), Exhibit US-2.

32. As described above, the Ninth Circuit Court of Appeal's decision in *Earth Island Institute v. Hogarth* is the final court decision that vacated the Secretary of Commerce's final finding under Section 1385(g) that would have permitted tuna products that contained tuna that was caught by setting on dolphins to be labeled dolphins safe. As a result, the DPCIA continues to condition use of the dolphin safe label on certifying that purse seine nets were not intentionally deployed on or used to encircle dolphins and that no dolphins were killed or injured in the set in which the tuna was caught.

4. GATT panel report

33. In 1991, Mexico challenged the DPCIA as inconsistent with U.S. obligations under Article I:1 of the GATT 1947. Mexico did not raise an Article III:4 claim in that dispute. A GATT panel concluded that the DPCIA was not inconsistent with the U.S. obligations under Article I:1 of the GATT 1947. Specifically:

The Panel proceeded to examine the subsidiary argument by Mexico that the labelling provisions of the DPCIA were inconsistent with Article I:1 because they discriminated against Mexico as a country fishing in the ETP....

The Panel noted that the DPCIA is based inter alia on a finding that dolphins are frequently killed in the course of tuna-fishing operations in the ETP through the use of purse-seine nets intentionally deployed to encircle dolphins. The DPCIA therefore accords the right to use the label "Dolphin Safe" for tuna harvested in the ETP only if such tuna is accompanied by documentary evidence showing that it was not harvested with purse-seine nets intentionally deployed to encircle dolphins. The Panel examined whether this requirement applied to tuna from the ETP was consistent with Article I:1. According to the information presented to the Panel, the harvesting of tuna by intentionally encircling dolphins with purse-seine nets was practised only in the ETP because of the particular nature of the association between dolphins and tuna observed only in that area. By imposing the requirement to provide evidence that this fishing technique had not been used in respect of tuna caught in the ETP the United States therefore did not discriminate against countries fishing in this area. The Panel noted that, under United States customs law, the country of origin of fish was determined by the country of registry of the vessel that had caught the fish; the geographical area where the fish was caught was irrelevant for the determination of origin. The labelling regulations governing tuna caught in the ETP thus applied to all countries whose vessels fished in this geographical area and thus did not distinguish between products originating in Mexico and products originating in other countries.

The Panel found for these reasons that the tuna products labelling provisions of the DPCIA relating to tuna caught in the ETP were not inconsistent with the obligations of the United States under Article I:1 of the General Agreement.

34. In the 1991 dispute, Mexico also challenged measures under U.S. law that banned the importation of yellowfin tuna and tuna products from countries fishing in the ETP with purse seine nets, in particular Mexico. The panel concluded that these measures were inconsistent with U.S. obligations under Article XI:1 of the GATT 1947. The United States has since removed these measures when it lifted the embargo on yellowfin tuna from Mexico in 2000 upon issuance of Mexico's affirmative finding.²² In its submission, Mexico omits this fact, as well as the fact that the GATT panel rejected its claims against the DPCIA.²³

B. Tuna Dolphin Issue

1. ETP and setting on dolphins to catch tuna

35. The ETP, as defined under U.S. law, extends from the West Coast of the Americas' central coastline westward to include most of the tropical Pacific east of the Hawaiian Islands, and includes high seas areas as well as the Exclusive Economic Zones (EEZs) and territorial seas of the United States, Mexico, Guatemala, El Salvador, Honduras, Nicaragua, Costa Rica, Panama, Colombia, Ecuador, Peru, Chile and France (due to the French overseas possession, Clipperton Island).²⁴

36. The two primary species of dolphins that are impacted by purse-seine fishing targeting tuna associate with dolphins in the ETP are northeastern offshore spotted dolphins and eastern spinner dolphins. Northeastern spotted dolphins and eastern spinner dolphins have been observed throughout the ETP, including in the U.S. EEZ,²⁵ and in the high seas.²⁶ In addition, coastal spotted dolphins are impacted by ETP purse-seine vessels that target dolphins to catch tuna; this stock of spotted dolphins is distributed in inshore ETP waters within about 25 kilometers of land between the southern tip of Baja California, Mexico and Colombia.²⁷

²² As described in Section III.C.1, an "affirmative finding" is required before countries harvesting yellowfin tuna in the ETP with large purse seine vessels (greater than 363 metric tons carrying capacity) export yellowfin tuna and yellowfin tuna products harvested by these vessels in the ETP to the United States. Mexico was first granted an affirmative finding in May 2000. 65 Fed. Reg. 26585 (May 8, 2000), Exhibit US-44.

²³ Mexico First Written Submission, paras. 59-60.

²⁴ The DPCIA defines the ETP as "the area of the Pacific Ocean bounded by 40 degrees north latitude, 40 degrees south latitude, 160 degrees west longitude, and the western coastlines of North, Central, and South America. DPCIA, 16 U.S.C. § 1385(c)(2), Exhibit US-5.

²⁵ Rice, D.W. 1998. Marine mammals of the world. Systematics and distribution. Special publication No. 4 of the Society for Marine Mammology, Lawrence, Kansas, USA. p.108, Exhibit US-45.

²⁶ Jackson, A., T. Gerrodette, S. Chivers, M. Lynn, S. Rankin, and S. Mesnick. 2008. Marine mammal data collected during a survey in the eastern tropical Pacific ocean aboard NOAA ships David Starr Jordan and McArthur II, July 28 - December 7, 2006. NOAA-TM-NMFS-SWFSC-421. p. 25, Tables 5, 6, Exhibit US-9.

²⁷ Rice, D.W. 1998. Marine mammals of the world. Systematics and distribution. Special publication No. 4 of the Society for Marine Mammology, Lawrence, Kansas, USA. p.108, Exhibit US-45.

37. As Mexico notes, for reasons that are not fully understood, schools of yellowfin tuna regularly tend to congregate under schools of dolphins in the ETP. Dolphins swim in the upper levels of the ocean where they are visible as they break the surface to breathe and leap into the air. Fishermen in the ETP look for the more easily visible dolphins, which lead them to the schools of tuna underneath.

38. Contrary to Mexico's assertions, the ETP is fundamentally different from all other oceans in that it is the only ocean where tuna and dolphins have a known regular and significant association. It is also the only ocean where that association is exploited as the foundation for a commercial fishery.²⁸ Mexico's submission vastly overstates the prevalence and regularity of the tuna-dolphin associations outside the ETP. While Mexico presents evidence that tuna and dolphins may occasionally associate in other ocean areas with similar oceanographic conditions to the ETP, none of the evidence cited by Mexico suggests that association is regular or sustained. In fact, Mexico's own exhibits evidence that the association between tuna and dolphins it cites is not regular. For example, the conclusion in Exhibit Mex-4 states:

This association nonetheless requires particularly *rare conditions*, as is confirmed by the testimony of local fisherman. In all of August 1998, which was devoted to attempting more detailed observations, results were weak; *only two yellowfin tuna, alone in a school of dolphins, were observed in 15 field days*. Some signals picked up by the sonar would suggest that their congeners were cruising at greater depths (60 to 80 m), but they never came up in the epipelagic zone, at least in the presence of observers.

Two tuna associating with dolphins in two weeks is neither regular nor sustained.

39. The information that Mexico cites in its submission at paragraphs 12-14 purportedly demonstrating that fishermen outside the ETP use a tuna-dolphin association to fish for tuna is misleading. Mexico documents early attempts by fishermen exploring the possibility of sustained associations to support a fishery in those oceans. Those attempts failed because the association was not regular or sustained enough to support a commercial fishery.²⁹ Thus, while the evidence Mexico cites may support the conclusion that tuna and dolphins may associate on an irregular or rare basis in other oceans, nothing in the evidence Mexico presents suggests that tuna and dolphins associate in other oceans in a way that would make it possible to exploit that

²⁸ Donahue, M.A. and E.F. Edwards. 1996. An annotated bibliography of available literature regarding cetacean interactions with tuna purse-seine fisheries outside of the eastern tropical Pacific Ocean. NOAA Administrative Report LJ-96-20. p. 38, Exhibit US-10.

²⁹ The Donahue (1996) study review attempts to exploit associations between tuna and dolphins in fisheries other than the ETPs and conclude that those attempts failed because the association was not regular or sustained enough to support a commercial fishery. Donahue, M.A. and E.F. Edwards. 1996. An annotated bibliography of available literature regarding cetacean interactions with tuna purse-seine fisheries outside of the eastern tropical Pacific Ocean. NOAA Administrative Report LJ-96-20. p.38, Exhibit US-10.

association to support a commercial fishery. The United States knows of no published information that a regular or sustained association sufficient to support a commercial fishery occurs outside the ETP.

40. Because of the regular and sustained association between dolphins and yellowfin tuna in the ETP, in the late 1950s, fishing boats began using purse seine nets to catch yellowfin tuna in a process referred to as “setting on dolphins,” “dolphin sets,” or “fishing on dolphins.” In this fishing method, dolphins are surrounded by a large net in order to catch the tuna that might be below. The fishermen use chase boats and helicopters to drive the dolphins into the center of the large net. In years past, explosives were also used in these efforts, although such practices have been prohibited under the AIDCP.³⁰ Floats and weights support the net, which closes at the bottom like a purse around all that is trapped inside.

41. Dolphins are chased for up to 90 minutes before the vessels are able to surround the dolphins and the tuna below.³¹ The air-breathing dolphins may drown when trapped under the net, or may be subjected to serious injury or death through entanglement in the net.³² Setting on dolphins to catch tuna not only results in dolphin mortalities and serious injury, but as described in Section III.B.2 the dolphins may suffer a number of other adverse effects.

42. The primary target of this fishing method is large, mature yellowfin tuna, and the bycatch is primarily dolphins. This method is currently employed by Mexico, El Salvador, Colombia, Venezuela, Panama, Guatemala, and Nicaragua.

43. Fishing vessels flagged to the United States began fishing in the ETP by setting on dolphins in the late 1950s. The U.S. fleet pioneered the dolphin setting technique, and vessels from other countries like Mexico took advantage of this innovation. Beginning around 1990, vessels from the United States began to abandon setting on dolphins to catch tuna. The Marine Mammal Protection Act (MMPA) progressively lowered the number of dolphins that U.S. vessels were permitted to accidentally kill when setting on dolphins to catch tuna in the ETP, and consumer and environmental group’s concerns about setting on dolphins to catch tuna were escalating. In response to these consumer and environmental group concerns, beginning in April 1990 the major U.S. tuna companies started announcing policies that they would not purchase or sell tuna that was caught by setting on dolphins.³³ By 1994, U.S. vessels had stopped setting on

³⁰ AIDCP, Annex VIII, para. 3(f), Exhibit Mex-11.

³¹ Myrick, A.C., and P.C. Perkins. 1995. Adrenocortical color darkness and correlates as indicators of continuous acute premortem stress in chased and purse-seine captured male dolphins. *Pathophysiology* 2: 191-204, p. 195, Fig. 2. Exhibit US-11.

³² Other methods to reduce dolphin mortality include avoiding sets made at sundown that finish after dark, sets in strong underwater currents and winds, sets where the gear malfunctions or the Medina panels are improperly aligned, sets in storms or heavy seas, use of explosives, and sets of long duration. See National Research Council, *Dolphins and the Tuna Industry*, 34-35, National Academy Press, Exhibit Mex-2.

³³ See Section III.C for further details.

dolphins to catch tuna.³⁴ Most U.S. vessels also left the ETP around that time to fish for tuna in other oceans, however, as recently as 2009 some U.S. vessels continued to fish in the ETP.³⁵ As the number of U.S. vessels in the ETP decreased, the number of non-U.S. vessels setting on dolphins to catch tuna in the ETP increased, along with the number of dolphin sets made per year. In 1993, just over 7,000 dolphin sets were made in the ETP, but by 2003 the number had increased to just under 14,000 dolphin sets.³⁶

44. All countries that have fleets that fish legally for tuna in the ETP are members, cooperating non-parties or cooperating fishing entities (collectively referred to as CPCs) of the IATTC. As part of their IATTC commitments, CPCs agreed that each CPC must place all vessels flagged to that country that fish for tuna in the ETP (regardless of size) on the IATTC Regional Vessel Register (IATTC Register).³⁷ Four thousand five hundred and twenty-two vessels flagged to 25 nations currently appear on the IATTC Register.³⁸ Of those, 228 vessels flagged to 14 countries currently appear on the IATTC list of Active Purse Seine Vessels.³⁹ Of these, 90 vessels from seven countries applied for and received a “dolphin mortality limit (DML)” for 2010.⁴⁰ (DMLs are discussed in Section III.B.2(b) below). Only vessels with a DML may set on dolphins to catch tuna in the ETP. Therefore, assuming that all registered vessels fished for tuna in the ETP, in 2010, 138 purse seine vessels must be using methods to fish for tuna in the ETP that do not involve setting on dolphins. If the number of vessels of each country requesting a DML is cross-referenced with the IATTC list of Active Purse Seine Vessels, it shows that at least 13 of the 14 countries, including Mexico, have vessels that fish for tuna in the ETP using methods that do not involve setting on dolphins.⁴¹

³⁴ Effective February 8, 1994, NMFS prohibited U.S. purse seine vessels from making additional intentional sets on dolphins in the ETP after the fleet had already killed 107 dolphins through February 6, 1994. 59 Federal Register 8417 (February 22, 1994), Exhibit US-12. No additional intentional sets on dolphins by the U.S. fleet are known to have occurred after that closure through the present. When the IDCPA (which amended the MMPA) was enacted in 1997, this prohibition was lifted. Under current U.S. law (MMPA, as revised by the IDCPA), U.S. fishing vessels are not prohibited from setting on dolphins to catch tuna in the ETP, provided it is done in accordance with the requirements of the AIDCP and U.S. regulations. IDPCA, 16 U.S.C. § 1413, Exhibit US-23E; 50 CFR 216.24, Exhibit US-23B.

³⁵ There were 31 U.S. vessels fishing for tuna in the ETP in 1990 compared to 14 in 1994 and 9 in 1995. There were 3 U.S. vessels fishing for tuna in the ETP in 2009. U.S. Vessels in the ETP 1989-2010, Exhibit US-13.

³⁶ See 2008 Report on the International Dolphin Conservation Program, p. 9.

³⁷ IATTC Resolution on a Regional Vessel Register (12-15 June 2000), Exhibit US-14.

³⁸ IATTC Regional Vessel Register, Exhibit US-16.

³⁹ IATTC Active Purse Seine Vessel Register, Exhibit US-15.

⁴⁰ 2010 DML Allocation, Exhibit US-50. A list of the numbers of boats, by nation, requesting DMLs for 2010 can be found in this document. CPCs requesting a DML include Mexico. Neither the United States nor Ecuador, for example, requested or received DMLs.

⁴¹ Compare 2010 DML Allocations, Exhibit US-50 with IATTC Active Purse Seine Vessel Register, Exhibit US-15.

45. While the vast majority of large Mexican purse seine vessels in the ETP choose to continue to set on dolphins to catch tuna, one-third of Mexican vessels registered to fish for tuna in the ETP comprises boats under 363 metric tons carrying capacity.⁴² Because, under the terms of the AIDCP these boats are prohibited from setting on dolphins to catch tuna, these vessels must use other methods to fish for tuna in the ETP. As elaborated below, Ecuadorian vessels fish for tuna in the ETP using techniques other than setting on dolphins to catch tuna, and tuna caught by such vessels is contained in tuna products that are sold in the United States with the dolphin safe label.

2. Adverse impact of setting on dolphins to catch tuna

(a) Depleted dolphin populations

46. From 1959 to 1976, setting on dolphins in the ETP is estimated to have caused the death of at least five million dolphins.⁴³ By 1993, the practice of setting on dolphins to catch tuna led to “depleted” designations under the MMPA for three dolphin stocks - the northeastern offshore spotted dolphin, the eastern spinner dolphin, and the coastal spotted dolphin - though this depletion likely occurred well before the designations were made.⁴⁴ The depleted designations were a formal recognition that the abundance of these three stocks had fallen below their optimum sustainable population size, which is the number of animals that will result in the maximum productivity of the population or the species.

47. These stocks have not recovered and remain depleted, with northeastern spotted and eastern spinner dolphins remaining at less than 30 percent of their historic abundance (19 percent

⁴² As of April 13, 2010, 19 of the 57 Mexican purse seine vessels listed on the IATTC Regional Vessel Register are vessel class five or smaller (less than 363 metric ton capacity), which means that they cannot make dolphin sets and that all of the tuna they harvest therefore meet the conditions under the U.S. dolphin safe labeling provisions to be labeled dolphin safe. IATTC Active Purse Seine Register, Exhibit US-15.

⁴³ Wade PR (1995) Revised estimates of incidental kill of dolphins (Delphinidae) by the purse-seine tuna fishery in the eastern tropical Pacific, 1959-1972. Fish Bull 93:345-354, p. 352, Exhibit US-17 (approximately 4 million dolphins killed from 1959-72); Marine Mammal Commission. 2008. Annual Report of the Marine Mammal Commission: Calendar Year 2007. A Report to Congress. Washington, DC: Marine Mammal Commission. p. 182, Table 19, Exhibit US-18. Per phone conversation, Wade 1995 estimates about 4 million for period 1959-1972; Marine Mammal Commission 2008 reports about 1 million for period 1973-1976.

⁴⁴ Pursuant to the MMPA, the National Marine Fisheries Services (“NMFS”) has found that three stocks of dolphins in the ETP are below their “optimum sustainable population” (“OSP”), and are thus “depleted.” See 42 Fed.Reg. 64,548-60 (1977) (coastal spotted dolphin), 58 Fed.Reg. 58,285 (1993) (northeastern offshore spotted dolphin), 58 Fed.Reg. 45,066 (1993) (eastern spinner dolphin). OSP is defined as a range of population levels between maximum net productivity and carrying capacity (*i.e.*, the historic marine mammal stock levels prior to extensive development of the tuna purse seine fishery). 16 U.S.C. § 1362(9). A species falls below its OSP if its population is less than 60 percent of its estimated “historic” levels. 45 Fed.Reg. 72178 (1980). At the time of the depletion findings, both the eastern spinner dolphin and the northeastern offshore spotted dolphins had fallen substantially below the 60 percent depletion standard.

for northeastern spotted dolphins and 29 percent for eastern spinner dolphins).⁴⁵ In addition, the most recent abundance estimates for these stocks indicate these stocks are still substantially below optimum sustainable population.⁴⁶

48. Abundance estimates from ETP dolphin and assessment surveys through 2006 do not provide a clear indication (i.e., there is no statistical significance) that these dolphin populations are currently recovering at the rate that would be expected (at least 4 percent/year) given their depletion levels. Further, given current uncertainty, it is possible these stocks are declining.⁴⁷ In light of these depletion levels and the drastic and well-documented reduction in observed dolphin deaths and serious injuries during fishing operations, the populations of the three depleted dolphin stocks should have been increasing significantly over the past 20 years. However, available information does not support that recovery is occurring.

49. Contrary to Mexico's assertion in paragraphs 87-88 of its submission, dolphin stocks have not exhibited clear signs of recovery despite the drastic reduction in observed mortality and serious injury during fishing. Dolphin population estimates in 2003 and 2006 were higher than estimates from surveys during the period 1998-2000. However, statistical and methodological constraints preclude a definitive conclusion as to whether the higher estimates mean the populations have actually increased. The study area for these estimates is so large and the confidence intervals⁴⁸ so wide that it is statistically possible that the actual growth rate is zero for ETP dolphin populations.⁴⁹ It is therefore not at all clear from the evidence that populations have

⁴⁵ Wade, P. R., G. M. Watters, T. Gerrodette, and S. B. Reilly. 2007. Depletion of spotted and spinner dolphins in the eastern tropical Pacific: modeling hypotheses for their lack of recovery. *Marine Ecology Progress Series* 343:1-14. p.7. Exhibit US-21.

⁴⁶ Gerrodette, T., G. Watters, W. Perryman, and L. Ballance. 2008. Estimates of 2006 Dolphin Abundance in the Eastern Tropical Pacific, with Revised Estimates from 1986-2003. NOAA Tech. Memo. NMFS-SWFSC-422. p.18, Table 3. Exhibit US-20.

⁴⁷ Gerrodette, T., G. Watters, W. Perryman, and L. Ballance. 2008. Estimates of 2006 Dolphin Abundance in the Eastern Tropical Pacific, with Revised Estimates from 1986-2003. NOAA Tech. Memo. NMFS-SWFSC-422. p.28, Table 13. Exhibit US-20.

⁴⁸ Confidence are an expression of how much uncertainty one has about an estimate, and they are calculated based on a specific data set. Confidence intervals generally increase with the size of the study area, animals that are difficult to see or are cryptic, infrequent surveys, inadequate survey effort, etc. Conversely, confidence intervals can be decreased by factors that increase certainty smaller study areas, more frequent surveys and more survey effort. 95% confidence intervals are typically used to indicate the lower and upper bounds between which one has 95% confidence the "true" value (in this case dolphin abundance estimate) lies. Therefore, point estimates are not necessarily the true value.

⁴⁹ Gerrodette, T., G. Watters, W. Perryman, and L. Ballance. 2008. Estimates of 2006 Dolphin Abundance in the Eastern Tropical Pacific, with Revised Estimates from 1986-2003. NOAA Tech. Memo. NMFS-SWFSC-422, Exhibit US-21. Gerrodette and colleagues (2008) reported that while 2006 point estimates for these stocks are higher than previous estimates, the 95% confidence intervals on the estimates of population growth rate include zero for these stocks (i.e., it possible both are stable or decreasing). An additional caveat in the interpretation of 2006 abundance estimates is the apparent decrease in abundance of western/southern spotted dolphins coincident with the apparent increased abundance of northeastern offshore spotted dolphins. In fact, these abundance point estimates are likely not "real" and instead result from animals moving across a fixed geographic boundary at 120W and 5N that is

increased. The study cited in Mexico's paragraphs 87-88 clearly articulates these caveats; however, these important nuances are omitted in Mexico's submission.

50. In sum, dolphin populations remain depleted and there is no clear indication that these populations are recovering. In fact, given the scientific uncertainty of the abundance numbers, it is possible that populations are decreasing. As detailed below, setting on dolphins to catch tuna has a number of adverse effects on dolphins. And, although not conclusive, the best available science suggests that these adverse affects are the most probable reason that dolphin populations continue to be depleted in the ETP and show no clear signs of recovery.

51. Furthermore, Mexico is wrong when it asserts in paragraph 88 of its submission that the U.S. courts relied on inaccurate information when vacating the Secretary of Commerce's final finding under the DPCIA. The courts found and affirmed that the best available scientific evidence at the time the Secretary made the finding was inconclusive and did not support a finding that the fishery-related activities were not significantly adversely impacting the dolphins. Among other reasons, the Ninth Circuit stressed that without the consideration of indirect effects on dolphin mortality of setting on dolphins to catch tuna, there is not a rational connection between the best available scientific evidence and a finding of no significant adverse impact that would allow setting on dolphins to be deemed not harmful to dolphins. In addition, more recent studies have largely served to confirm and bolster the information provided at the time of the Secretary's final finding, namely that ETP dolphin populations have not exhibited a clear sign of (i.e. statistically significant) recovery and that the purse seine fishery setting on dolphins can negatively impact ETP dolphins in a number of ways beyond observed mortality and serious injury.

(b) Adverse effects on dolphins

52. Unless special measures are taken to protect the dolphins trapped in the nets with the tuna, setting on dolphins results in a high level of dolphin mortality. Under the terms of the AIDCP, parties to the AIDCP have agreed to ensure that their respective flag vessels that fish for tuna in the ETP implement measures to reduce the number of dolphins that are killed or seriously injured in the nets. While these measures have significantly reduced the number of dolphins observed killed or seriously injured in the nets, dolphins continue to be killed and seriously injured when set upon to catch tuna.

53. In fact, because it is expected that some dolphins will die as a result of being set upon to catch tuna, vessel owners that choose to set on dolphins to catch tuna in the ETP must apply for and be granted a "dolphin mortality limit" or DML each year in order to fish for tuna in the ETP using this method.⁵⁰ The AIDCP establishes an annual DML that is divided among eligible

used to define the stocks (but that is not associated with an observed hiatus in the distribution of spotted dolphins). Thus, these point estimates are not indicative of a real increase or decrease in abundance of the two stocks.

⁵⁰ AIDCP, Annex VIII, Exhibit Mex-11.

vessels, as determined by the AIDPC parties. The overall DML for 2009 was 5000 dolphins. In others words, consistent with the terms of the AIDCP, 5000 dolphins may be killed or seriously injured each year (and in earlier years of the fishery this number was higher) as a result of setting on dolphins to catch tuna.⁵¹ In 2008, 1,168 dolphins were observed killed or seriously injured when set upon to catch tuna in the ETP.⁵²

54. Furthermore, research indicates that indirect or delayed effects of setting on dolphins to catch tuna can result in dolphin deaths and reductions in the rate of reproduction, even where no dolphins are observed to be killed or seriously injured during the set. This is the case even when proven mitigation measures are used to reduce immediate dolphin mortality or injury.⁵³ Therefore, although Mexico is correct that the magnitude of *observed* dolphin mortality due to setting on dolphins with purse seine nets has decreased significantly, observed mortality and serious injury fail to measure the full impact that setting on dolphins to catch tuna has on dolphins.

55. For example, dolphin mothers and nursing calves are often separated during the high-speed chase and encirclement. This separation is due to the high speed (14 knots) and long duration (up to 90 minutes) of the chase phase of dolphin sets. Dependent dolphin calves are incapable of keeping pace with their mothers, and as a result they are separated (several nautical miles or more, if assuming only a 30 minute chase at 14 knots) and die as a result of starvation, predation and other causes even when their mothers are released from sets alive.⁵⁴ Scientists have examined mothers killed without dependent calves in ETP purse-seine sets for the periods 1973-1990 and 1996-2000. Studies estimate that because of mother-calf separation, the number of orphaned calves that die as a result of predation and starvation following a chase is approximately 14 percent higher than dolphin calve mortality observed and attributed to that fishery.⁵⁵ Therefore, annual observed dolphin mortality should be increased by at least 14 percent to capture this unobserved impact. Inclusion of the death of dependent calves after their mothers are chased and separated from them, even if released alive, would increase the mortality of spotted dolphins by 10 to 15 percent and spinner dolphins by 6 to 10 percent in the sets examined in this study.⁵⁶ Assuming these sets are representative of overall fishing activity and

⁵¹ AIDCP, Annex II, Exhibit Mex-11.

⁵² 2008 IATTC Annual Report, Exhibit US-24, p. 50-51.

⁵³ Gerrodette, T., and J. Forcada. 2005. Non-recovery of two spotted and spinner dolphin populations in the eastern tropical Pacific Ocean. *Mar. Ecol. Prog. Ser.* 291: 1-21. p. 17. Exhibit US-22.

⁵⁴ Noren, S.R., and E.F. Edwards. 2007. Physiological and behavioral development in Delphinid calves: implications for calf separation and mortality due to tuna purse-seine sets. *Marine Mammal Science* 23: 15-29. p. 21. Exhibit US-4

⁵⁵ Archer, F., T. Gerrodette, S. Chivers, and A. Jackson. 2004. Annual estimates of missing calves in the pantropical spotted dolphin bycatch of the eastern tropical Pacific tuna purse-seine fishery. *Fishery Bulletin* 102:233-244. Exhibit US-27.

⁵⁶ Archer, F., Gerrodette, T., Dizon, A., Abella, K. and Southern, S. 2001. Unobserved kill of nursing dolphin calves in a tuna purse-seine fishery. *Marine Mammal Science* 17(3): 540-554 (hereinafter “Archer 2001”). Exhibit

the demographics of dolphin schools in the ETP this increased mortality is applicable to all dolphin sets in the ETP.

56. Additional harm to dolphins from setting on dolphins includes:

- a. acute cardiac and muscle damage caused by the exertion of avoiding or detangling from the nets (“capture myopathy”);⁵⁷
- b. cumulative organ damage in released dolphins due to overheating from the chase;
- c. failed or impaired reproduction;
- d. compromised immune function; and
- e. increased predation rates by predators such as sharks, which can congregate outside the nets and take advantage of exhausted or juvenile dolphins when released.⁵⁸

57. Though studies are ongoing to determine comprehensive quantitative estimates for these effects on dolphin populations, it is clear that the purse seine dolphin setting fishery has a negative impact on dolphins beyond observed deaths and serious injuries.

58. Furthermore, dolphins are likely to be repeatedly exposed to the dangers of purse seine dolphin sets. Millions of dolphins are chased and encircled each year to catch tuna in the ETP.⁵⁹ On average, each northeastern offshore spotted dolphin is chased 10.6 times per year and captured 3.2 times per year, each eastern spinner dolphin is chased 5.6 times per year and captured 0.7 times per year, and each coastal spotted dolphin is chased 2.0 times per year.⁶⁰

59. Thus, there are numerous negative effects the fishery could be having on the dolphin populations beyond the reported kill.

US-28.

⁵⁷ Capture myopathy refers to a condition in which wild animals have been restrained or forced to endure extremely high exertion levels. Affected animals die or may live several days and show muscle stiffness and similar conditions. Merck Veterinary Manual (9th Edition), available at <http://www.merckvetmanual.com/mvm/index.jsp?cfile=htm/bc/91011.htm&word=myopathy>. In wild dolphins, capture myopathy, if not immediately lethal, would increase the likelihood of predation and reduce an animal's ability to forage, reproduce, etc.

⁵⁸ Reilly et al. 2005. Report of the scientific research program under the International Dolphin Conservation Program Act. NOAA-TM-NMFS-SWFSC-372, 101 p. Exhibit US-19.

⁵⁹ The number of dolphins chased and encircled each year can be estimated based on the following sources: IATTC Document IRP-34-10 (Revised). Effectiveness of technical guidelines to prevent high mortality during sets on large dolphin herds. La Jolla, CA, October 2003, p.3, Table 1 and p.4, Table 2, Exhibit US-29; 2008 IATTC Annual Report, Exhibit US-24, p.46. Table 1 of IRP-34-10 (Revised) shows the percentage of total dolphin mortality, by the number of dolphins captured per set from January 1, 1999 to June 30, 2002. Table 2 shows the percentage of total dolphin mortality, by the number of dolphins captured per set from July 1, 2002 to April 30, 2003. The total number of dolphin sets in 2002 was 12,290 (a relatively high year) and in 2007 was 8,871 (a relatively low year). Information on 2002 and 2007 dolphin sets obtained from the 2008 IATTC Annual Report.

⁶⁰ NOAA Final IDCPA Science Report, 2005.

(c) Bycatch

60. Though Mexico expends considerable effort describing bycatch associated with other fishing techniques, the issue of bycatch of species other than dolphins is irrelevant to this dispute. The purpose of the U.S. measures is twofold: to ensure consumer are not misled about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins and to ensure that the U.S. market is not used to encourage fishing fleets to use fishing techniques that adversely affect dolphins and in this way contribute to protecting dolphins. That other fishing methods produce bycatch species other than dolphins is not relevant to the objective of the measures at issue. It also does not negate the fact that dolphins are harmed when they are set upon to catch tuna.

61. In fact, the tables in paragraph 35 of Mexico's submission highlights that setting on dolphins to catch tuna is almost solely responsible for observed dolphin mortality of all purse seine fishing methods in the ETP. According to the most recent statistics available from the IATTC, dolphin sets for tuna in the ETP killed 1,168 dolphins in 2008, while purse seine sets on floating objects and free swimming schools combined killed only a single dolphin.⁶¹

62. Mexico's focus on bycatch of other species also neglects to consider that bycatch of dolphins in the ETP is unique as compared to any other ocean or fishery. The bycatch of dolphins involved in setting on dolphins to catch tuna in the ETP stands apart from marine mammal bycatch in other fisheries, both in scale (millions of dolphins are intentionally encircled each year in the ETP)⁶² and in the way the dolphins interact with the fishery. Marine mammals interact with most fishing gear only incidentally, but in the ETP when dolphins are set upon to catch tuna the dolphins are an intrinsic part of the fishing operation.

63. Furthermore, the tables reflecting various "bycatch" of different fishing techniques in the ETP included in paragraphs 35 and 36 of Mexico's submission do not and cannot accommodate the information that would go into an assessment of the relative ecosystem impacts of various fishing techniques. Mexico appears to treat the sheer number of captures of non-targets species as indicative of the relative impact of various fishing techniques. This is not a scientifically sound basis from which to draw a conclusion that one fishing technique is more "environmentally sound" than the other. Comparing the relative environmental impacts of various fishing techniques is a much more complex task and the analysis would need to consider, among other factors, the total removals of the fishery (target and non-target species), ecological effects of intense harvest of the targeted upper-level predators and the biomass and reproductive capacity of the animals removed. For example, spotted dolphins mature at age 8 to 14 years and females

⁶¹ 2008 IATTC Annual Report, Exhibit US-24, pp. 50-51.

⁶² See para. 59 (noting that millions of dolphins are chased and encircled each year to catch tuna in the ETP and explaining calculation). As note above, a single dolphin may be chased multiple times per year resulting in millions of them being chased and encircled each year.

give birth to one calf every 1 to 5 years, while dorado, for example, mature at age 1 and reproduce very quickly.

64. Moreover, the tables that Mexico includes in paragraphs 35 and 36 of its submission are misleading. Although the second and third tables in paragraph 35 of Mexico's submission refer to "bycatch of billfishes" and "bycatches of animals other than tunas and billfishes," the tables – with the exception of the figure for "marine mammals" and "turtles" – actually reflect "captures" of these animals.⁶³ "Captures" are the aggregate of "catches" of non-targeted fish (retained on board for utilization), "bycatches" (discarded dead or likely to die) and "releases" (released alive).⁶⁵ Therefore, with the exception of "marine mammals" and "sea turtles," it is not possible to discern from the second and third tables in paragraph 35 of Mexico's submission the number of billfishes, and animals other than tuna and billfishes, that were killed as compared to those that were utilized or released alive. With respect to sea turtles and "marine mammals," figures in the second and third tables in paragraph 35 reflect the number of sea turtles and dolphins that were killed in purse seine sets.⁶⁶ As a result, with respect to the three purse seine techniques used to catch tuna in the ETP, the second and third tables in paragraph 35 compare on the one hand, dolphins and sea turtles *killed*, and on the other, billfishes and animals other than billfishes, tuna, dolphins and sea turtles *captured* – i.e., caught and either utilized, released alive or killed. Mexico's tables importantly omit the over *three to six* million dolphins that are chased and encircled each year when purse seine nets are intentionally set upon them to catch tuna.⁶⁷

65. In addition, Mexico uses a completely inappropriate methodology in its analysis in the table in paragraph 36, its analysis in paragraph 37, and its conclusion in paragraph 38 of its submission. First, it attempts to add the "bycatch" of tuna, which are measured in metric tons, and the "bycatch" of billfishes and other animals, which is in numbers of individuals. This kind of comparison is nonsensical. Second, even if Mexico had made a logical comparison in its table, its analysis would remain incomplete. Numbers of animals of many species are compared without regard to size, life history characteristics, susceptibility to

⁶³ Mexico may have been confused by the 2007 IATTC Annual Report. Tables 3b and 3c of that report are labeled "bycatches of billfishes" and "bycatches of animals other than tunas and billfishes." Those tables, however, with the exception of the figure for "marine mammals," represent captures. (As explained above, the figure for "marine mammals" reflects dolphin mortalities.) The 2008 IATTC Annual Report correctly labels Tables 3b and 3c as "captures of billfishes" and "captures of animals other than tunas and billfishes." The number of "captures" listed in the 2008 IATTC Annual Report match the number of "bycatches" listed in the 2007 IATTC Annual Report. Compare 2007 IATTC Annual Report, Exhibit Mex-10, pp. 54-60 with 2008 IATTC Annual Report, Exhibit US-24 pp. 48-50.

⁶⁴ This is in line with the 2007 IATTC Annual Report's labeling. In 2008 the tables similar to the third chart in Mexico's submission was updated to reflect this distinction.

⁶⁵ 2008 IATTC Annual Report, Exhibit US-24, p. 10.

⁶⁶ 2008 IATTC Annual Report, Exhibit US-24, p. 11.

⁶⁷ IATTC. 2003. Effectiveness of technical guidelines to prevent high mortality during sets on large dolphin herds. Document IRP-34-10. La Jolla, CA. October 2003. p. 4, Table 2. Exhibit US-29.

overfishing, or position in the food web. These flaws and myopic perspectives are apparent in the bycatch discussion presented in paragraphs 36-38 of Mexico's submission.

66. This is not to suggest that the United States disagrees that bycatch associated with other fishing techniques is a concern. Bycatch is a concern within every fishery, and the United States together with other countries undertakes significant efforts to address bycatch associated with other fisheries. Some of these efforts are elaborated in Section III.B.4 below. The U.S. efforts to protect oceanic and other environmental resources and ecosystems reflect a balance of competing interests, and the nature of the measures applicable to each fishery is dependent on the specific characteristics of each fishery. The measures at issue in this dispute concern efforts by the United States to address the bycatch of dolphins in the ETP.

3. Fishing techniques other than setting on dolphins

67. There are several fishing methods available to catch tuna other than setting on dolphins. As described below, some of these methods also involve purse seine nets. With the exception of dolphin fishing, which requires some additional special equipment such as extra speed boats and a dolphin safety panel on the net, the various methods of purse-seine fishing are available to all purse-seine boats and can be used in essentially the same manner in any of the of the world's oceans, including the ETP. The same boats and much of the same gear used to set on dolphins to catch tuna may be used to catch tuna using other techniques, specifically sets on floating objects and unassociated schools of tuna.

(a) Sets on free swimming schools of tuna

68. Sets on free swimming schools of tuna can be performed globally by any purse-seine vessel, including those equipped to set on dolphins. To set on free swimming schools, schools of tuna are located at or near the surface and then encircled. Commonly caught species include skipjack tuna and yellowfin tuna, but others species may be captured in this manner as well. In the ETP, nations employing fishing on free swimming schools include Mexico, El Salvador, Colombia, Venezuela, Panama, Guatemala, Nicaragua, the United States, Ecuador, Bolivia, Honduras, Peru, Spain, and Vanuatu. Globally, the list of nations that set on free swimming schools of tuna is significantly larger. Whereas setting on free swimming schools was historically the dominant method of purse-seine fishing for tuna outside of the ETP, within the last 15 years, the fishing on floating objects has eclipsed it as the dominant method.

(b) Sets on floating objects

69. Sets on floating objects are performed in all oceans – the Atlantic, Indian and the central and western Pacific Ocean – in addition to the ETP. Tuna and other marine species will congregate around and under almost any structure at or near the ocean surface. However, in recent years the majority of tuna fishing on floating objects occurs on man-made fish aggregating devices (FADs). FADs can be made from a range of materials and commonly have both floating

and submerged components. Some fishermen construct FADs from unwanted items such as shipping pallets and old fishing nets, while others use more advanced materials and designs. Many FADs are also deployed with a GPS tracking/transmitting devices, and even fish finders, which allow fishing vessels to monitor the location of a FAD and the amount of biomass swimming in the vicinity. Some FADs deployed in shallow waters are anchored to the bottom, but most are set to drift and may make trans-oceanic transits, being utilized by multiple vessels along the way. Floating objects in general can aggregate a number of species of fish, but the primary target of FAD fisheries are skipjack tuna. All purse seine boats are capable of making sets on floating objects. Mexico purse seine vessels, for example, will opportunistically set on floating objects (or unassociated schools of tuna) to catch tuna. For some (e.g. the U.S. fleet in the central and western Pacific), setting on floating objects is the primary method of fishing employed, where as for others, FAD sets maybe undertaken only occasionally, and on an opportunistic basis.

(c) Other methods

70. Other methods to catch tuna include longline and pole and line. Longline fishing is practiced everywhere tuna is harvested. It involves attaching a large number of baited hooks to a long, single line via a number of shorter lines called branch lines. The most common target of longline vessels globally is adult bigeye tuna, but they may target and catch yellowfin, bluefin, and albacore tuna in addition to the non-tuna species mentioned above. The Asian fishing nations are the dominant players in longline tuna fisheries, but longline boats are used around the world and are also common in the fleets of developing countries, as they are generally much cheaper to buy and operate than large purse seine vessels.

71. Pole and line fishing is still practiced today in a handful of places. This method involves catching schooling tuna which are be attracted to the surface by the use of live bait which is chummed beside the boat. Poles and lines with barbless hooks are then used to hook the fish and bring them on board. The U.S. albacore tuna fishery uses this technique where very little bycatch occurs. Hydraulically operated rods or automatic angling machines may be used on larger pole and line vessels. Pole and line fishing has declined significantly, largely due to the emergence of longline and purse-seine methods.

72. Troll vessels, using artificial lures with barbless hooks, have fished for albacore in the North Pacific (which includes parts of the ETP) since the early 1900's. The number of U.S. vessels participating in this fishery totaled 622 in 2007.⁶⁸

4. U.S. efforts to protect dolphins and other marine species

73. Mexico makes a number of suggestions in its submission that the United States does not undertake efforts to protect marine mammals other than dolphins or to address other

⁶⁸ NMFS Administrative Report LJ-08-05.

environmental concerns. As summarized in the next paragraphs, Mexico's suggestions are incorrect. In providing this summary, the United States wishes to emphasize that it is providing it to counterbalance the limited view of the matter presented in Mexico's submission. The panel should not take from this summary that the United States believes examination of these measures is relevant to the substantive issues in this dispute.

74. The United States has undertaken significant efforts, both in its domestic legal regime and through intergovernmental agreements, international organizations, and capacity building abroad, to minimize the harmful effects of bycatch on marine species (including marine mammals, sea turtles, sea birds, and certain shark and fish species) and to reduce the injury and mortality of marine species in all fisheries. In enacting laws and regulations that address specific environmental harms as well as seeking to address these impacts through international engagement the United States intends that all such measures will work collectively toward the goal of the protecting and maintaining viable marine ecosystems.⁶⁹

75. Domestic laws that provide for the reduction of fisheries bycatch as well as other protections for marine species include, inter alia, the Marine Mammal Protection Act (MMPA),⁷⁰ the Endangered Species Act,⁷¹ the Magnuson Stevens Fishery Conservation and Management Act,⁷² as well as statutes that implement U.S. obligations under regional fishery management agreements. In the international sphere, the United States is a party to or a participant in a wide array of international instruments and organizations that provide for international cooperation in the conservation and management of living marine resources, including the AIDCP,⁷³ the United

⁶⁹ The MMPA explicitly recognizes the relevance of marine mammal protection to the broader objective of a healthy marine ecosystem, providing "it is the sense of the congress that [marine mammals] should be protected and encouraged to develop to the greatest extent feasible ... and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem." 16 U.S.C. § 1361 (6).

⁷⁰ 16 U.S.C. § 1361 et seq. The MMPA protects marine mammals by prohibiting take of marine mammals in U.S. waters and by U.S. citizens on the high seas, and the importation of marine mammals and marine mammal products into the United States. The Act establishes a national policy to prevent marine mammal species and population stocks from declining beyond the point where they ceased to be significant functioning elements of the ecosystems of which they are a part. Limited exceptions to the take prohibition can be made for take incidental to commercial fishing and other nonfishing activities, and are associated with requirements to ensure the take does not exceed a sustainable level.

⁷¹ 16 U.S.C. § 1531 et seq. The Endangered Species Act provides for the listing of threatened and endangered species and designation of their critical habitat; requires the conservation and recovery of such species; and implements various treaties such as the Convention on Trade in Endangered Species of Wild Fauna and Flora.]

⁷² 16 U.S.C. § 1801 et seq. The Magnuson-Stevens Fishery Conservation and Management Act is the primary law to conserve and manage fisheries under U.S. federal jurisdiction in the marine waters in the U.S. exclusive economic zone (seaward of state waters to 200 miles from the coasts) and on the high seas. For most fisheries, the policies are developed and recommended to the Secretary of Commerce by eight regional fishery management councils that are comprised of representatives of various federal and state agencies as well as persons with knowledge of the fisheries (commercial and recreational fishing representatives, NGO's, academics, etc.). The primary purpose of the Act is to manage fish to maintain long-term optimum yield and sustainability, while avoiding bycatch.

⁷³ AIDCP, Exhibit Mex-11.

Nations Food and Agriculture Organization,⁷⁴ the United Nations Fish Stocks Agreement,⁷⁵ a number of regional fisheries management agreements,⁷⁶ the International Convention for the Regulation of Whaling,⁷⁷ the Inter-American Convention for the Protection and Conservation of Sea Turtles, and the Convention on International Trade in Endangered Species of Wild Fauna and Flora.⁷⁸ The United States also engages in capacity building and other international assistance activities to assist States in their implementation of these international mandates. Such efforts have included enforcement training in Central America, cooperative work in the South Pacific and development of observer programs in West Africa.⁷⁹

5. The Panama Declaration, AIDCP and US actions in accordance with them

76. As Mexico explains in its submission, in 1995 Mexico, the United States and other member countries of the IATTC⁸⁰ negotiated and concluded what is referred to as the Panama Declaration. In the Panama Declaration, signatories declared their intention to conclude a binding international agreement on dolphin conservation in the ETP (what later became the Agreement on International Dolphin Conservation Program or AIDCP).⁸¹ This declaration

⁷⁴ Instruments adopted under the auspices of the FAO that address bycatch of living marine resources include the International Plan of Action for the Conservation of Sharks (1998), available at <ftp://ftp.fao.org/docrep/fao/006/x3170e/X3170E00.pdf> (last viewed April 16, 2010); International Plan of Action for Reducing Incidental Catches of Seabirds in Longline Fisheries (1998), available at <ftp://ftp.fao.org/docrep/fao/006/x3170e/X3170E00.pdf> (last viewed April 16, 2010); Guidelines to Reduce Sea Turtle Mortality in Fishing Operations (2004), available at <http://www.fao.org/docrep/012/i0725e/i0725e00.htm>, (last viewed April 16, 2010).

⁷⁵ Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Aug. 4, 1995, 2167 U.N.T.S. 88.

⁷⁶ Regional fisheries management agreements to which the United States is Party include the Convention for the Conservation of Atlantic Tunas, May 14, 1966, 20 U.S.T. 2887, 673 U.N.T.S. 63; Convention for the Establishment of an Inter-American Tropical Tuna Commission, May 31, 1949, 1 U.S.T. 230, 80 U.N.T.S. 3; Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, September 5, 2000, 40 ILM 278. Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, Oct. 24, 1978, 1135 U.N.T.S. 369.

⁷⁷ International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72

⁷⁸ Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27.2 U.S.T. 1087, 993 U.N.T.S. 243.

⁷⁹ For more information on bycatch reduction activities conducted by the United States internationally, see generally National Marine Fisheries Service, 2009 Report on Fisheries Bycatch Reduction Standards and Measures Relevant to Section 202(h) of the Magnuson-Stevens Fishery and Conservation Management Act, available at http://www.nmfs.noaa.gov/by_catch/docs/bycatch_standards_report_final.pdf (last viewed April 16, 2010)

⁸⁰ The IATTC manages the fishery for yellowfin tuna, skipjack tuna, and other fish caught by tuna vessels in the ETP. The IATTC Convention presently has sixteen parties, including the United States and Mexico, six cooperating non-parties, and one cooperating fishing entity.

⁸¹ Panama Declaration, p. 1, Exhibit Mex-20.

reflected the signatories' shared view that measures being undertaken pursuant to a non-binding dolphin conservation agreement (referred to as the La Jolla Agreement) were making a substantial contribution to the reduction of dolphin mortality in the ETP.⁸² The Panama Declaration expressly states that signatories' intention to adopt a legally binding agreement "is contingent upon enactment of changes in United States law as envisioned in Annex I to this Declaration."⁸³ Annex I of the Panama Declaration provides:

Envisioned changes in United States law:

1. Primary and Secondary Embargoes: Effectively lifted for tuna caught in compliance with the La Jolla Agreement as formalized and modified through the process set forth in the Panama Declaration.
2. Market Access². Effectively opened to tuna caught in compliance with the La Jolla Agreement as formalized and modified through the process set forth in the Panama Declaration with respect to States to include: IATTC Member States and other States that have initiated steps, in accordance with Article 5.3 of the IATTC Convention, to become members of that organization.
3. Labeling: The term "dolphin safe" may not be used for any tuna caught in the [ETP] by a purse seine vessel in a set in which a dolphin mortality occurred as documented by observers by weight calculation and well location.⁸⁴

77. In its submission, Mexico mischaracterizes the Panama Declaration. In particular, Mexico asserts that the Panama Declaration committed the United States to "amend its law to allow tuna products containing tuna caught in compliance with the AIDCP to bear a 'dolphin safe' label."⁸⁵ The Panama Declaration does not, however, commit the United States to amend its law or to take any other action. Instead, it states signatories' intention to negotiate a binding international conservation agreement but that signatories only intended to adopt such an agreement if certain changes were enacted into U.S. law. Those changes included prohibiting use of the "term 'dolphin safe' for any tuna caught in the ETP by a purse seine vessel in a set in which a dolphin mortality occurred as documented by observers by weight calculation and well location."

78. The U.S. Executive Branch successfully persuaded the U.S. Congress (i.e. Legislative Branch) to amend U.S. law to reflect the changes described in Annex I of the Panama

⁸² Panama Declaration, p. 1, Exhibit Mex-20.

⁸³ Panama Declaration, p. 1, Exhibit Mex-20.

⁸⁴ Panama Declaration, p. 5, Exhibit Mex-20. Footnote 2 states: "Spain maintains a reservation on point number two of the Annex "Market Access," pending further review."

⁸⁵ See, e.g., Mexico First Written Submission, para. 8.

Declaration. The U.S. Congress amended the MMPA to lift the embargo on tuna caught in compliance with the La Jolla Agreement (as it would later be transformed into the AIDCP) and, through the affirmative finding process set out in the amended MMPA, provided the market access described in Annex I.⁸⁶ The U.S. Congress also amended the DPCIA to permit tuna products containing tuna that was caught by setting on dolphin to be labeled dolphin safe but exercised its legislative prerogative to make that change contingent on a scientific finding by the Secretary of Commerce that setting on dolphins to catch tuna was not having a significant adverse impact on depleted dolphin populations.

79. These amendments were enacted in 1997 before the United States and seven other signatories to the Panama Declaration concluded the AIDCP in 1998. (The AIDCP entered into force in February 1999.) Parties to the AIDCP, therefore, knew at the time they concluded the AIDCP what changes the United States had enacted, including that use of the dolphin safe label for tuna products containing tuna caught by setting on dolphins was contingent on findings that setting on dolphins to catch tuna was not having a significant adverse impact on dolphins in the ETP. Currently, 12 countries and the European Union are parties to the AIDCP and Bolivia and Colombia apply the agreement's provisions provisionally.⁸⁷

80. The AIDCP is an inter-governmental agreement and applies to the “purse-seine tuna fishery” in the “agreement area.”⁸⁸ The AIDCP “agreement area” is larger (10 degrees longitude larger) than the ETP as defined in the DPCIA⁸⁹. The AIDCP is open to accession by any country or regional economic integration organization: (i) with a coastline bordering the agreement area; (ii) that is a member of the IATTC;⁹⁰ or (iii) whose vessels fished for tuna in the agreement area between May 21, 1998 and May 14, 1999.⁹¹ The objective of the AIDCP include “to progressively reduce incidental dolphin mortalities” in the agreement area (i.e., ETP plus an additional 10 degrees longitude) and “to seek ecologically sound means of capturing large yellowfin tunas not in association with dolphins” “with a the goal of eliminating dolphin mortality in this fishery.”⁹²

⁸⁶ These changes effectively eliminated the measures that were the subject of Mexico's GATT Article XI:1 claims in the 1991 GATT dispute.

⁸⁷ See <http://www.iattc.org/IDCPENG.htm> (last accessed February 7, 2010).

⁸⁸ See, e.g., AIDCP, Articles II- V, Exhibit Mex-11. The AIDCP defines the area to which it is applicable (the “agreement area”) as “the area of the Pacific Ocean bounded by the coastline of North, Central and South America and by the following lines: a. [t]he 40°N parallel from the coast of North America to its intersection with the 150° W meridian; b. [t]he 150°W meridian to its intersection with the 40°S parallel; c. [a]nd the 40°S parallel to its intersection with the coast of South America.”

⁸⁹ See DPCIA, 16 U.S.C. § 1385(b)(2), Exhibit US-5.

⁹⁰ Colombia, Costa Rica, Ecuador, El Salvador, France, Guatemala, Japan, Mexico, Nicaragua, Panama, Peru, Korea, Spain, the United States, Venezuela, and Vanuatu are members of the IATTC. See <<http://www.iattc.org/HomeENG.htm>> (Last accessed April 8, 2010).

⁹¹ AIDCP, Articles XXIV and XXVI, Exhibit Mex-11.

⁹² AIDCP, Article II, Exhibit Mex-11.

81. As noted above, the AIDCP establishes an overall DML for the agreement area⁹³ and provides for individual vessels to request and receive a portion of the overall DML.⁹⁴ Only vessels parties to the AIDCP that have a DML may set on dolphins to catch tuna in the agreement area.⁹⁵ The AIDCP sets the overall DML at no more than 5000 dolphins per year (which may and has been lowered in some years).⁹⁶ The AIDCP also sets out measures that parties must take to implement and monitor that provision, including ensuring that all boats in their fleet with a carrying capacity greater than 363 metric tons have on board an observer on 100 percent of fishing trips.⁹⁷ These observers are to document whether they observe dolphins being killed or seriously injured in any sets, among other data collection responsibilities.⁹⁸ The AIDCP also requires parties to ensure that vessels meet a significant number of operational requirements such as equipment and procedures to facilitate the release of dolphins from purse seine nets and to minimize dolphin mortalities and injuries. It is important to emphasize that these requirements focus on *observed* dolphin mortalities and injuries. The AIDCP approved observer program and requirement to facilitate release of dolphins are not designed to monitor or address unobserved dolphin mortalities – i.e., those mortalities that occur after a dolphin set or as the result of the chase that precedes the set.

82. The AIDCP identifies the IATTC as having “an integral role in coordinating the implementation of [the AIDCP] and states that the parties shall “request the IATTC to provide Secretariat support.”⁹⁹ The AIDCP does not establish or otherwise authorize an organization, body or legal entity to adopt decisions; this function remains with the governments collectively as the parties to the AIDCP, and they alone can adopt the inter-governmental agreements represented in the AIDCP as “resolutions” which can either be legally binding or non-binding on the governments.

83. In 2001, the AIDCP parties adopted a resolution on “Procedures for AIDCP Dolphin Safe Certification System.”¹⁰⁰ These procedures are non-binding. In fact, the resolution explicitly states that application of the procedures: “shall be voluntary for each Party, especially in the event that they may be inconsistent with the national laws of a Party.” This language was included at the request of the United States because its domestic law prevented it from applying the procedures. For those parties that chose to apply it, the resolution established the procedures that would enable tuna caught and tracked in accordance with the procedures to receive an “AIDCP dolphin-safe certification.”

⁹³ AIDCP, Annex V, Exhibit Mex-11.

⁹⁴ AIDCP, Annex IV, Exhibit Mex-11.

⁹⁵ AIDCP, Annex VIII, Exhibit Mex-11.

⁹⁶ AIDCP, Annex V, para. 1, Exhibit Mex-11.

⁹⁷ AIDCP, Annex II, Exhibit Mex-11.

⁹⁸ AIDCP, Annex II, Exhibit Mex-11.

⁹⁹ AIDCP, Article XIV, Exhibit Mex-11.

¹⁰⁰ AIDCP Resolution to Establish Procedures for *AIDCP Dolphin Safe Tuna Certification*, Exhibit Mex-56.

C. Market for Tuna Products

1. Mexican Tuna Market

84. Mexico is a net importer of tuna and tuna products. In 2008, Mexico imported five times the amount of tuna that it exported.¹⁰¹ Nearly one quarter of Mexican exports of tuna and tuna products were to the United States. Thus, in 2008, Mexico imported US\$ 323 million worth of tuna and tuna products and exported US\$ 63 million of tuna and tuna products.¹⁰²

85. Mexico is able to export yellowfin tuna to the United States because it has an affirmative finding under the MMPA. The MMPA requires countries harvesting yellowfin tuna in the ETP with large purse seine vessels (greater than 363 metric tons carrying capacity) to have an affirmative finding in order to export yellowfin tuna and yellowfin tuna products harvested by these vessels in the ETP to the United States.¹⁰³ To obtain an affirmative finding, the Secretary of Commerce must determine that a country wishing to export yellowfin tuna and yellowfin tuna products to the United States is complying with all current conservation measures of the IATTC and the AIDCP (which includes measures related to tuna conservation, bycatch reduction, seabird mortality, sharks, and sea turtles). Without an affirmative finding, importation of yellowfin tuna is prohibited.¹⁰⁴ Affirmative findings are granted for a period of five years. Mexico was first granted an affirmative finding in 2000, which was renewed on April 1, 2005 for another five years. Mexico submitted a request for a new five-year affirmative finding on March 31, 2010; if issued, it would be in effect until March 31, 2015.

86. Mexico is estimated to have a multi-million dollar domestic tuna market served primarily by its own tuna industry. Mexico's domestic tuna industry is highly developed and dominated by a few large companies. Pescados Industrializados, S.A., or PINSA, produces the "Dolores" brand of tuna, and about half of the market share of the Mexican tuna market.¹⁰⁵ PINSA is one of the largest players in the Latin American tuna industry. Its modernized plant operates 24 hours a day under strict guidelines which enforce proper hygiene and mass production of more than 1,000,000 cans of tuna daily. The company is vertically integrated, with most of the fishing vessels owned by PINSA (the large Pescadora Azteca de Mazatlan fleet) fishing in the ETP. While the majority of its large purse seine fleet sets on dolphins, PINSA also has small-scale purse seine fishing boats, whose catch are currently eligible for the U.S. dolphin safe label.¹⁰⁶

¹⁰¹ Mexican Imports and Exports of Tuna and Tuna Products, Exhibit US-3.

¹⁰² Mexican Imports and Exports of Tuna and Tuna Products, Exhibit US-3.

¹⁰³ See MMPA, 16 U.S.C. §1371(a)(2)(B), Exhibit US-23C; 50 CFR § 216.24, Exhibit US-23B. The Secretary of Commerce has delegated authority to make affirmative findings to the National Marine Fisheries Services (NMFS).

¹⁰⁴ See 50 CFR § 216.24(f)(6), Exhibit 23B.

¹⁰⁵ Information on Dolores tuna and PINSA is available on the company's website at <http://www.dolorestuna.com/>.

¹⁰⁶ PINSA web site, available at <http://www.pinsa.com/main.php?s=3>

87. Grupomar, owner of the Tuny brand, is a set of companies that has been catching, processing and marketing tuna and seafood for over 25 years. Grupomar brand tuna is the second largest tuna producer in Mexico, and touts the many catch achievements by its purse seine fleet.¹⁰⁷ A third company, Nair Tuna, a subsidiary of the multinational corporation Herdez, catches more than 20,000 tons of yellowfin tuna per year.¹⁰⁸ Herdez is a US\$2 billion dollar company.

2. U.S. Tuna Market

88. The three largest tuna producers in the U.S. market are: (1) Dongwon Industries, owner of the StarKist Company and the Starkist brand; (2) Thai Union, owner of Chicken of the Sea International, which markets the Chicken of the Sea brand; and (3) Bumble Bee Foods, LLC. Inc. Together these producers account for nearly vast majority of the canned tuna sold in the United States.

89. Demand for canned tuna in the United States has been declining.¹⁰⁹ For example, in 2008 canned tuna consumption in the United States was 1.27 kilos per person, which compares to 1.5 kilos per person in 2004 and a peak of 1.77 kilos per person in 1989.¹¹⁰ In 2008, U.S. canned pack of tuna totaled 215 million kilos.¹¹¹ U.S. pack is what U.S. companies produce from tuna harvested by domestic and foreign flag vessels in the United States, Puerto Rico and American Samoa.

90. In 2009, the U.S. imports of fresh and frozen tuna totaled \$US 538 million (or 96 million kilos) and U.S. imports of canned tuna totaled \$US 613 million (or 180.5 million kilos).¹¹² Imports of tuna and tuna products from countries with purse seine vessels that fish for tuna in the ETP totaled \$US 139 million.¹¹³ Imports of tuna and tuna products from Ecuador – a country whose flag vessels fish for tuna in the ETP using techniques other than setting on dolphins – totaled US\$101 million in 2009.¹¹⁴ Imports of tuna and tuna products from Mexico totaled US\$13 in 2009. Of the \$US 13 million of exports to the United States, US\$ 7.5 million were tuna in cans, pouches and other air-tight containers.¹¹⁵

¹⁰⁷ Information on the Tuny brand and Grupomar is available on the company's website at <<http://www.grupomar.com/empresa.htm>>.

¹⁰⁸ Information on Nair tuna is available on the company's website at <<http://www.atunnair.com.mx/>>.

¹⁰⁹ World Fishing, Tuna market trends 2006/2007 (August 1, 2007), Exhibit US-33.

¹¹⁰ NMFS, Fisheries of the United States 2008 (July 2009), page 75, Exhibit US-34.

¹¹¹ NMFS, Fisheries of the United States 2008 (July 2009), page 67, Exhibit US-34.

¹¹² U.S. Imports of Tuna 2009 (all countries), Exhibit US-2.

¹¹³ U.S. Imports of Tuna, Exhibit US-1.

¹¹⁴ U.S. Imports of Tuna, Exhibit US-1C.

¹¹⁵ U.S. Imports of Tuna, Exhibit US-1G.

91. Although the majority of Mexico’s tuna fleet comprises large purse seine vessels that set on dolphins to catch tuna, as noted above one-third of Mexico’s tuna fleet comprises vessels smaller than 363 metric tons carrying capacity that are prohibited from setting on dolphins. Up until 2002, tuna caught by some of these boats was contained in tuna products that were sold to U.S. canners as dolphin safe in the United States.¹¹⁶

92. U.S. consumers have indicated a preference for tuna that is not caught by setting on dolphins, and consumer demand decreases if it is not clear whether a label conveys information about the harm to dolphins. This preference is reflected in the purchasing policies of the three largest U.S. tuna producers. For example, each of the company’s websites indicate that the companies will not purchase tuna caught in association with dolphin:

StarKist: “StarKist will not purchase any tuna caught in association with dolphins.”¹¹⁷

Bumble Bee: “Bumble bee will not purchase tuna from vessels that net fish associated with dolphins.”¹¹⁸

Chicken of the Sea: “All tuna purchased, processed and sold by Chicken of the Sea is dolphin-safe... None of the tuna we purchase is caught in association with dolphins.”¹¹⁹

93. These companies first announced these policies in 1990.¹²⁰ In addition, around the same time when the harm cause to dolphins as a result of fishing operations in the ETP came into public light, consumers boycotted large grocers that sold tuna products that contained tuna caught in association with dolphins. In response, large grocers in the U.S. refused to stock tuna products that contain tuna that was caught by setting on dolphins.

94. Although most tuna products that contain tuna caught in a manner that meets the conditions to be labeled dolphin safe under the DPCIA is labeled dolphin safe, some producers and retailers choose to omit the dolphin safe label and use the products packaging space to include other information. For example, as part of its Tuna Tracking and Verification Program, NMFS conduct spot audits of tuna products offered for sale in the United States. In some of these spot audits, NMFS found tuna products that were not labeled dolphin safe, but that NMFS could verify did not contain tuna that was caught during a trip where dolphins were set upon or in a set in which dolphins were killed or seriously injured.

¹¹⁶ NMFS, Tuna Tracking and Verification Database.

¹¹⁷ StarKist, Frequently Asked Questions, Exhibit US-32.

¹¹⁸ Bumble Bee, Frequently Asked Questions, Exhibit US-36.

¹¹⁹ Chicken of the Sea, Dolphin-Safe Policy, Exhibit US-37.

¹²⁰ 3 Companies to Stop Selling Tuna Netted With Dolphins, New York Times (April 12, 1990), Exhibit US-38.

95. Despite consumer preferences for tuna that is not caught by setting on dolphins, tuna caught by setting on dolphins is sold in the United States. For example, the Dolores brand is widely sold throughout the United States and is popular in grocers that cater to Hispanic consumers and over the Internet from a U.S.-based Internet grocer.¹²¹

IV. LEGAL ARGUMENT

A. Introduction

96. Mexico challenges three measures in this dispute: (1) the DPCIA; (2) 50 CFR § 216.91-92; and (3) *Earth Island Institute v. Hogarth*, 494 F.3d 757 (2007). Mexico claims that these measures are inconsistent with U.S. obligations under Articles I:1 and III:4 of the GATT 1994 and Articles 2.1, 2.2, and 2.4 of the TBT Agreement.¹²² Each of Mexico's claims should be rejected; Mexico has failed to establish a *prima facie* case that the U.S. measures are inconsistent with any of these obligations.

97. First, as outlined above and further elaborated below, the U.S. dolphin safe labeling provisions do not discriminate based on origin. Instead, the U.S. measures provide that tuna products of any origin that contains tuna that was caught by setting on dolphins may not be labeled dolphin safe. Mexico cannot claim, simply because its fleet chooses to set on dolphins to catch tuna and therefore not to meet the conditions to use the dolphin safe label, that the U.S. measures discriminate against Mexican tuna. Use of the dolphin safe label is equally prohibited for U.S. tuna and tuna from other countries if it was caught by setting on dolphins. Accordingly, Mexico cannot sustain its claims under Articles I:1 and III:4 of the GATT 1994 or Article 2.1 of the TBT Agreement.

98. Second, the U.S. dolphin safe labeling are voluntary and therefore do not constitute technical regulations falling within the scope of the TBT Agreement. Accordingly, Mexico cannot even establish that Articles 2.1, 2.2, and 2.4 of the TBT Agreement – which apply only to technical regulations – apply to the U.S. measures much less that they are inconsistent with them.

99. Third, the dolphin safe labeling provisions serve a legitimate objective of ensuring that consumers are not misled or deceived about whether the tuna products they may purchase contain tuna caught by a method that adversely affects dolphins. In addition, to the extent that consumers choose not to purchase tuna without the dolphin safe label, the U.S. measures fulfill an additional objective to ensure that the U.S. market is not used to encourage fishing fleets to set on dolphins to and in turn to contribute to the protection of dolphins. Allowing tuna to be labeled “dolphin safe” that is caught by setting on dolphins would not fulfill either of these objectives. Accordingly, Mexico cannot sustain its claims under Articles 2.2 and 2.4 of the TBT Agreement,

¹²¹ See, e.g., Mexgrocer Website at <<http://www.mexgrocer.com/brand-dolores-tuna.html>> .

¹²² Although Mexico also included Article 2.3 of the TBT Agreement it is panel request, Mexico appears to have abandoned that claim as it is not addressed in its submission.

which rely on its assertion that permitting tuna products that contain tuna that was caught by setting on dolphins to be labeled dolphin safe would fulfill the legitimate objectives of the United States in an appropriate, effective and less trade-restrictive manner.

B. The U.S. dolphin safe labeling provisions are not inconsistent with the GATT

1. The U.S. dolphin safe labeling provisions are not inconsistent with GATT Article III:4

100. Article III:4 of the GATT 1994 states in relevant part:

The products of the territory of any [Member] imported into the territory of any other [Member] shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

101. Mexico has failed to establish that the U.S. dolphin safe labeling provisions afford less favorable treatment to imported products than like domestic products. As elaborated below, the U.S. dolphin safe labeling provisions do not discriminate based on origin and therefore do not afford less favorable treatment to Mexican tuna products as compared to like domestic products: the U.S. dolphin safe labeling provisions condition use of the dolphin safe label on whether the tuna product contains tuna that was caught by setting on dolphins and this condition applies regardless of the origin of the tuna.

102. Before turning to Mexico's factual arguments with respect to less favorable treatment, it is important to point out that, contrary to what Mexico states in its written submission at paragraph 155, the measures at issue here are not mandatory. The DPCIA and related regulations are voluntary. In particular, whether to label products as dolphin safe is a choice. The provisions do not require tuna products to be labeled or to contain certain information on a label. As explained in Section III, it is perfectly legal to sell tuna products in the United States that are not dolphin safe and that do not bear the dolphin safe label. As the GATT 1947 panel examining this issue stated:

The Panel noted that the labelling provisions of the DPCIA do not restrict the sale of tuna products; tuna products can be sold freely both with and without the "Dolphin Safe" label. Nor do these provisions establish requirements that have to be met in order to obtain an advantage from the government. Any advantage which might possibly result from access to this label depends on the free choice by consumers to give preference to tuna carrying the "Dolphin Safe" label. The labelling provisions therefore did not make the right to sell

tuna or tuna products, nor the access to a government-conferred advantage affecting the sale of tuna or tuna products, conditional upon the use of tuna harvesting methods.¹²³

103. With respect to whether the U.S. dolphin safe labeling provisions afford less favorable treatment to Mexican tuna and tuna products, Mexico claims that, because “Mexican tuna are almost exclusively caught in the ETP using purse-seine nets that are set upon dolphins,”¹²⁴ the prohibition on using the dolphin safe label on tuna products that contain tuna caught by setting on dolphins affords less favorable treatment to Mexican tuna and tuna products. Mexico’s argument should be rejected.

(a) The U.S. provisions do not modify the conditions of competition because all tuna is subject to the same conditions on use of the dolphin safe label

104. As the Appellate Body has explained (and as Mexico notes in its submission),¹²⁵ a measure affords less favorable treatment to imported products than to like domestic products if it “modifies the conditions of competition in the relevant market to the detriment of imported products.”¹²⁶ The Appellate Body has also characterized a measure that affords less favorable treatment to imported products as one that gives domestic products a competitive advantage in the market.¹²⁷ As elaborated below, the U.S. dolphin safe labeling provisions do not modify the conditions of competition to the detriment of Mexican tuna and tuna products nor do they give a competitive advantage to U.S. tuna and tuna products.

105. First, any tuna product – regardless of origin – that contains tuna that was caught during a trip by setting on dolphins or in a set in which dolphins were killed or seriously injured does not meet the criteria for the dolphin safe label. In other words, the U.S. provisions do not condition eligibility to use the dolphin safe label on the origin of the tuna product, but rather on the manner in which it was caught, in particular if dolphins were set upon, killed or seriously injured.

106. Thus, to the extent that eligibility to use the dolphin safe label is a “condition of competition,” the U.S. provisions do not alter the conditions of competition to the detriment of Mexican tuna or tuna products. The U.S. provisions provide that any tuna products – regardless of origin – may use the dolphin safe label if they meet the criteria for the label. These criteria are origin neutral.

(b) The U.S. provisions do not afford less favorable treatment to Mexican tuna or tuna products

¹²³ GATT Panel Report, *US - Tuna Dolphin I*, para. 5.42.

¹²⁴ Mexico First Written Submission, para. 165.

¹²⁵ Mexico First Written Submission, para. 162-163.

¹²⁶ Appellate Body Report, *Korea – Beef*, para. 137.

¹²⁷ Appellate Body Report, *DR – Cigarettes*, para. 93.

107. Mexico bases its argument that the U.S. provisions afford less favorable treatment to Mexican tuna and tuna products on its contention that “Mexican tuna are almost exclusively caught in the ETP using purse seine nets that are set upon dolphins”¹²⁸ and therefore, by denying use of the dolphin safe label for tuna products that contain tuna caught by setting on dolphins in the ETP, the U.S. measures afford less favorable treatment to Mexican tuna and tuna products. This argument is flawed on several levels.

108. First, as a factual matter Mexico’s fleet does not “almost exclusively” set on dolphins in the ETP to catch tuna. One-third of the vessels in Mexico’s tuna fleet is under 363 metric tons and therefore considered incapable of setting on dolphins to catch tuna.¹²⁹ Tuna products containing tuna caught by these vessels are already eligible under the U.S. provisions to use the dolphin safe label. This in itself is evidence that the U.S. provisions do not afford less favorable treatment to Mexican tuna and tuna products based on origin.

109. Second, the U.S. dolphin safe labeling provisions afford use of the dolphin safe label equally to all tuna products that meet the conditions set out in those provisions and deny that possibility equally to all tuna products that fail to meet those conditions. The fact that the U.S. dolphin safe labeling provisions prohibit tuna products containing tuna caught by setting on dolphins – a technique that some Mexican vessels happen to use – does not mean that the U.S. provisions afford less favorable treatment to Mexican tuna and tuna products. Instead, it means that Mexican vessels have chosen to set on dolphins to catch tuna and, because of that choice, tuna products that contain tuna caught by setting on dolphins by those vessels do not meet the conditions necessary to use the dolphin safe label, just as tuna products containing tuna caught by vessels flagged to any other country, including the United States, do not meet the conditions necessary to use the dolphin safe label.

110. Mexico appears to seek to support its argument that the U.S. provisions afford less favorable treatment to Mexican tuna by asserting that it would be too difficult or costly for Mexican vessels to catch tuna in such a way that would enable tuna products containing tuna caught by Mexican vessels to be labeled dolphin safe.¹³⁰ Mexico’s contention, however, only bolsters the point that there is nothing in the U.S. dolphin safe labeling provisions that prevents tuna products that contain tuna caught by Mexican vessels from being labeled dolphin safe. It is that Mexican vessels have chosen and continue to choose to catch tuna by setting on dolphins that makes tuna products containing tuna caught by these vessels ineligible for the dolphin safe label.

¹²⁸ Mexico First Written Submission, para. 165.

¹²⁹ As of April 13, 2010, 19 of the 57 Mexican purse seine vessels listed on the IATTC Regional Vessel Register are vessel class five or smaller (less than 363 metric ton capacity), which means that they cannot make dolphin sets and that all of the tuna they harvest therefore meet the conditions under the U.S. dolphin safe labeling provisions to be labeled dolphin safe. IATTC Active Purse Seine Register, Exhibit US-15.

¹³⁰ Mexico First Written Submission, para. 167.

111. As the GATT 1947 panel found with respect to Article I:1 of the GATT 1947,

The Panel noted that, under United States customs law, the country of origin of fish was determined by the country of registry of the vessel that had caught the fish; the geographical area where the fish was caught was irrelevant for the determination of origin. The labelling regulations governing tuna caught in the ETP thus applied to all countries whose vessels fished in this geographical area and thus did not distinguish between products originating in Mexico and products originating in other countries.¹³¹

This analysis is also relevant for Article III:4 since there is no distinction between products originating in Mexico and products originating in the United States.

**(c) Mexico does not provide sufficient evidence to support its
GATT Article III:4 claim**

112. The foregoing analysis sufficiently rebuts Mexico's GATT Article III:4 argument as a matter of law, but the United States would like to point out in the following paragraphs a few additional facts that may be of interest to the Panel in construing the facts that Mexico has alleged to substantiate its claims.

113. First, Mexico overstates the cost and difficulty of using other techniques to catch tuna and in fact provides no evidence to support its claim that using other techniques would require Mexican vessels to "incur considerable financial and other costs."¹³² The same boats and much of the same gear used to set on dolphins to catch tuna may be used to catch tuna using other techniques, specifically sets on floating objects and unassociated schools of tuna. For example, in the ETP, the same purse seine nets that Mexican vessels set on dolphins could be used to set on tuna congregating around floating objects or unassociated schools. In fact, Mexican purse seine vessels are known, as do all purse seine vessels fishing in the ETP, when the opportunity presents itself, to set their nets on fish associated with floating objects and on unassociated schools of tuna. It is also noteworthy that in the past at least some large purse seine Mexican vessels used techniques other than setting on dolphins to catch tuna because they wanted to ensure that tuna products containing tuna that they caught could be labeled dolphin safe under the U.S. dolphin safe labeling provisions.¹³³ Further, vessels flagged to other countries – including developing countries – that fish for tuna in the ETP use techniques to catch tuna other than setting on dolphins. Ecuadorian vessels, for example, fish for tuna by setting purse seine nets on floating objects and on unassociated schools of tuna to catch the tuna, and tuna products that

¹³¹ GATT Panel Report, *US - Tuna Dolphin I*, para. 5.43.

¹³² Mexico First Written Submission, para. 166.

¹³³ See Statement of Mr. Francisco Valdez, President of Seafood Emporium Inc., Exhibit US-39.

contain tuna caught by these Ecuadorian vessels are sold in the United States with the dolphin safe label.¹³⁴

114. Mexico also overstates that the ETP is its “traditional fishing grounds” and that fishing for tuna in another fishery (where there is not a regular and significant association between tuna and dolphins) would be too costly. While Mexican vessels have traditionally fished for tuna in the ETP, so too do vessels flagged to a number of other countries. There is nothing inherently Mexican about the technique of setting on dolphins. In fact, the technique was initially developed by U.S. flagged vessels but later abandoned when it became clear that U.S. consumers had a preference for tuna that was not caught by setting on dolphins. Thus, the ETP is not simply where Mexico fishes for tuna but it is where vessels from a number of other countries fish for tuna, including the United States.¹³⁵ Furthermore, Mexican tuna and tuna products are not Mexican by virtue of being caught in the ETP or the waters off the coast of Mexico. They are Mexican because the vessels used to catch tuna are operating under Mexican jurisdiction, or because they are processed in Mexican tuna processing plants. If Mexican vessels want to take advantage of the option to use the dolphin safe label, the country of origin of the tuna is not a barrier in any way.

115. As to Mexico’s contention that it would be too costly for Mexican vessels to fish for tuna in other fisheries, Mexico has provided no evidence to substantiate that contention.

116. In reality, Mexico’s argument appears not to be that it is cost-prohibitive for Mexican vessels to fish for tuna using techniques other than setting on dolphins or to fish for tuna in other fisheries where there is not a regular and significant association between tuna and dolphins, but that it is more convenient for Mexico to set on dolphins to catch tuna in the ETP than it is to fish for tuna in another fishery or to use alternative techniques to catch tuna. However, Mexican vessels’ choice to fish for tuna in the ETP by setting on dolphins because they consider it the most convenient or profitable way to catch tuna is not a basis to argue that the U.S. dolphin safe labeling provisions afford less favorable treatment to Mexican tuna and tuna products.

117. In fact, some U.S. vessels used this technique to catch tuna in the ETP until 1994. Therefore, U.S. vessels made the choice to stop setting on dolphins in the ETP to catch tuna and to employ other techniques to catch tuna in ETP or to fish for tuna in other fisheries where there is no regular and significant association between tuna and dolphins. Had U.S. vessels decided to continue to set on dolphins to catch tuna in the ETP, as Mexico has chosen, the U.S. provisions

¹³⁴ In 2010, Ecuador did not request and did not receive a DML for any of its flag vessels. This means that no Ecuadorian vessels are authorized to set on dolphins in 2010 and that none of the US\$ 14 worth of tuna imports from Ecuador in the first two months of 2010 were caught by setting on dolphins in the ETP. See IATTC 2010 DML Allocation, Exhibit US-50; U.S. Imports of Tuna, Exhibit US-1C.

¹³⁵ According to the current IATTC vessel register, 228 vessels from 14 nations fish in the eastern Pacific Ocean in currently. IATTC Vessel Register List 2009, Exhibit US-16. While only 3 U.S. flag vessels fished for tuna in the ETP in 2009 and 2 currently, records show that, since the year 2000, 21 distinct U.S. flagged vessels have fished for tuna in the ETP at varying times. U.S. Vessels in ETP, Exhibit US-13.

would prohibit U.S. tuna products containing tuna caught by these vessels from being labeled dolphin safe. The fact that Mexican vessels have not yet made the choice to forgo setting on dolphins to catch tuna in the ETP, while the U.S. vessels have, is not grounds to assert that the U.S. dolphin safe labeling provisions afford less favorable treatment to Mexican tuna and tuna products.

118. To support its arguments that the U.S. dolphin safe labeling afford less favorable treatment to Mexican tuna and tuna products, Mexico makes several statements about the relative environmental impacts of setting on dolphins to catch tuna as compared to other techniques to catch tuna in the ETP.¹³⁶ These arguments are irrelevant to the question of whether the U.S. dolphin safe labeling provisions afford less favorable treatment to Mexican products. Moreover, as addressed in Section III, Mexico's assertion that setting on dolphins to catch tuna is the "most environmentally responsible way to fish for tuna"¹³⁷ in the ETP is unfounded on many levels and ignores that setting on dolphins to catch tuna is the only technique to catch tuna that involves intentional bycatch.

119. Because U.S. dolphin safe labeling provisions do not afford less favorable treatment to Mexican tuna or tuna products, Mexico has failed to establish a prima facie case that the U.S. provisions are inconsistent with Article III:4 of the GATT 1994.

2. The U.S. dolphin safe labeling provisions are not inconsistent with GATT Article I:1

120. The U.S. measures at issue are consistent with Article I:1 of the GATT. Article I:1 of the GATT states in relevant part :

With respect to...all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any [Member] to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other [Member].

121. As described below, the U.S. measures at issue in this dispute do not accord any advantage to products of any other member that is not also immediately and unconditionally accorded to products of Mexico. Just as the U.S. measures do not discriminate against Mexico within the meaning of Article III:4, those measures are nondiscriminatory within the meaning of Article I:1. To summarize:

¹³⁶ Mexico First Written Submission, paras. 34-38, 165, 167.

¹³⁷ Mexico First Written Submission, paras. 38, 165.

- The U.S. measures do not modify the conditions of competition because all tuna is subject to the same conditions on use of the dolphin safe label. The criteria for being eligible to use the dolphin safe label are origin neutral.
- The U.S. measures do not afford less favorable treatment to Mexican tuna or tuna products. Tuna products containing tuna caught by some Mexican vessels are already eligible under the U.S. provisions to use the dolphin safe label. Other Mexican vessels have chosen to set on dolphins to catch tuna and, because of that choice, tuna products that contain tuna caught by setting on dolphins by those vessels do not meet the criteria necessary to use the dolphin safe label.
- Mexico does not provide sufficient evidence to support its GATT Article I:1 claim. While Mexican vessels have traditionally fished for tuna in the ETP, so too do vessels flagged to a number of other countries, and Mexico does not explain why the origin neutral rules disadvantage it. Mexico's arguments about the relative environmental impacts of various fishing techniques are irrelevant to the question of whether the U.S. dolphin safe labeling provisions afford less favorable treatment to Mexican products, and Mexico's assertion that setting on dolphins to catch tuna is the "most environmentally responsible way to fish for tuna" in the ETP is unfounded.

122. The Article I:1 analysis by the GATT 1947 panel in *Tuna Dolphin I* could not be more relevant, and the panel, responding to essentially the same arguments from Mexico in that dispute, concluded that the dolphin safe labeling measures were not inconsistent with Article I:1. (See GATT Panel Report, *US – Tuna Dolphin I*, paras. 5.43-5.44.)

123. Finally, it is worth noting that Mexico is wrong in its articulation of the “advantage, favour or privilege” granted by the United States by virtue of its dolphin safe labeling regime. Contrary to Mexico’s assertion, the advantage, favour, or privilege at issue in this dispute is not merely the right to label tuna products as dolphin safe. No Member has the right to unconditionally label its products dolphin safe under U.S. law. Rather the advantage, favour, or privilege granted by the United States is the opportunity to use the dolphin safe label if the conditions on use of the dolphin safe label are met.

124. Therefore, the U.S. measures do not accord an advantage, favour, or privilege to tuna or tuna products originating in any other country that is not also accorded to Mexico within the meaning of GATT Article I:1.

C. The U.S. dolphin safe labeling provisions are not inconsistent with the TBT Agreement

1. The U.S. dolphin safe labeling provisions are not technical regulations and therefore not subject to Article 2 of the TBT Agreement

125. Article 2 of the TBT Agreement concerns the preparation, adoption and application of *technical regulations* by central government bodies.¹³⁸ Technical regulation is a term that is defined to have a special meaning under the TBT Agreement. Accordingly, measures that fall outside the definition of a technical regulation are not subject to the obligation set out in Article 2 of the TBT Agreement. As elaborated below, the U.S. dolphin safe labeling provisions do not meet the definition of a technical regulation set out in Annex 1 of the TBT Agreement and, therefore, Article 2 does not apply and the U.S. dolphin safe labeling provisions cannot be inconsistent with Article 2 of the TBT Agreement, in particular Articles 2.1, 2.2 or 2.4.

126. Annex 1 of the TBT Agreement defines a technical regulation as follows:

Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may *also* include or *deal exclusively with* terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.¹³⁹

Read together the first and second sentences of the definition make clear that technical regulations are documents with which compliance is mandatory¹⁴⁰ and that “lay down product characteristics or their related processes and production methods” or “deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method” or both (i.e., lay down product characteristics as well as include terminology, symbols, packaging, marking or labelling requirements).¹⁴¹

¹³⁸ Article 2.1 requires Members to ensure that in respect of *technical regulations*, products from the territory of any Member are accorded treatment no less favorable than that accorded to like products of national origin and to like products originating in any other country. Article 2.2 requires Members to ensure that *technical regulations* are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade and for this purpose requires Members to ensure that technical regulations are not more trade-restrictive than necessary to fulfill a legitimate objective. Article 2.3 prohibits Members from maintaining *technical regulations* if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a less trade-restrictive manner. Finally, Article 2.4 requires Members to base their *technical regulations* on relevant international standards, or the relevant parts of them, except when such international standards or relevant parts of them would be an ineffective or inappropriate means to fulfill a legitimate objective.

¹³⁹ TBT Agreement, Annex 1, para. 1 (emphasis added).

¹⁴⁰ The phrase “with which compliance is mandatory” applies to the terminology, symbols, packaging, marking or labelling requirements listed in the second sentence because the second sentence specifies alternative aspects with which a document meeting the definition of a technical regulation might deal; compliance with a document dealing with terminology, symbols, packaging, marking or labelling must still be mandatory for it to fall within the definition of a technical regulations. This is confirmed by the explanatory note to the definition of “standard” in Annex 1 of the TBT Agreement which provides that “[f]or purposes of this Agreement standards are defined as voluntary and technical regulations as mandatory documents.”

¹⁴¹ The Appellate Body in *EC – Asbestos* appears to mistakenly have read the second sentence as providing examples of “product characteristics” covered by the first sentence of the definition. Appellate Body Report, *EC – Asbestos*, para. 67. The panel in *EC – GIs* (Complaint by Australia) repeated this same mistake in concluding that

127. In contrast, Annex 1 of the TBT Agreement defines "standard" as follows:

Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, *with which compliance is not mandatory*. It may also include or deal exclusively with terminology, symbols, packaging, marking or *labelling requirements* as they apply to a product, process or production method.

Members' obligations with respect to standards are addressed in Article 4 and Annex 3 of the TBT Agreement. Article 4 requires Members to ensure their central government standardizing bodies comply with the Code of Good Practice in Annex 3. Annex 3, for example, requires Members' central government standardizing bodies to ensure that standards are not prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to trade and to use relevant international standards or relevant parts of them as the basis for the standards they develop, except where they would be ineffective or inappropriate.¹⁴² Thus, Article 4 and Annex 3 sets out Members' obligations with respect to documents with which compliance is voluntary, whereas Article 2 sets out Members' obligations with respect to documents with which compliance is mandatory. Notably, both the definition of standard and the definition of technical regulation encompass "labelling requirements". Whether a "labelling requirement" falls within the scope of standard or technical regulation thus depends on whether compliance with that requirement is mandatory.

128. Mexico asserts that the U.S. dolphin safe labeling provisions constitute a technical regulation because they: (1) apply to an identifiable group of products (tuna products); (2) set out product characteristics ("the conditions under which a tuna product can be labeled as 'dolphin

labeling requirements themselves are product characteristics. Panel Report, *EC – GIs* (Complaint by Australia), para. 7449. The second sentence of the definition of technical regulation, however, does not contain examples of product characteristics; it sets out aspects other than product characteristics that may be the subject of a document with which compliance is mandatory and thus fall within the definition of a technical regulation. This can be discerned from the wording of the second sentence which states that "it may also or exclusively deal with...." The "it" refers back to the word "document" in the first sentence such that the document may in addition or instead deal with aspects that are not considered product characteristics such as terminology or labeling requirements. The Appellate Body's interpretation of the second sentence appears to ignore the word "also." The Appellate Body's approach thus appears not to give full effect to the terms of the relevant provisions of the TBT Agreement and is therefore not an approach that should be followed. It also overlooks that the word "also" was included in the second sentence of the definition of technical regulation as compared to the parallel provision of the "Tokyo Round Standards Code" (the predecessor agreement to the TBT Agreement) which does not include the word "also." GATT, Agreement on Technical Barriers to Trade (1979), Annex 1. The Committee on Technical Barriers to Trade (TBT Committee) discussed this fact in June 1991 TBT Committee meeting. Finland, supported by the United States and the EC, noted that the then draft TBT Agreement included the word "also" at the beginning of the second sentence and this supported the view that the second sentence was additional to the first. See *Negotiating History of the Coverage of the Agreement on Technical Barriers to Trade with Regard to Labeling Requirements, Voluntary Standards, and Processes and Production Methods Unrelated to the Product Characteristics*, WT/CTE/W/10, G/TBT/W/11 (Restricted) 29 August 1995, para 21.

¹⁴² TBT Agreement, Annex 3, paragraphs E and F.

safe”); and (3) are mandatory (“it is unlawful to include on the label of any tuna product offered for sale in the United States the term ‘dolphin safe’ or any analogous term or symbol” if the product contains tuna that was caught by setting on dolphins in the ETP).¹⁴³ While the United States does not disagree that the U.S. dolphin safe labeling provisions apply to an identifiable group of products (tuna products), Mexico’s assertions that the U.S. dolphin safe labeling provisions set out product characteristics and are mandatory are incorrect.

129. The U.S. dolphin safe labeling provisions do not set out product characteristics for tuna products. Instead, the U.S. provisions – as Mexico acknowledges – specify the conditions under which tuna products may be labeled dolphin safe. In this regard, the U.S. provisions set out requirements that must be met for tuna to be labeled dolphin safe. The U.S. provisions do not, however, specify the product characteristics (or their related processes or production methods) that tuna products must meet (or not meet) to be sold on the U.S. market.¹⁴⁴

130. The U.S. dolphin safe labeling provisions, however, are not mandatory. They constitute a voluntary labeling measure and such voluntary labeling measures are not covered by the definition of a technical regulation set out in Annex 1 of the TBT Agreement. As explained above, the definition of technical regulation in Annex 1 of the TBT Agreement states that a technical regulation is a “document ...with which compliance is mandatory.” The explanatory note to the definition of standard in Annex 1 of the TBT Agreement also states: “For purposes of this Agreement, standards are defined as voluntary and technical regulations as mandatory documents.”

131. The Appellate Body has addressed the question of whether compliance with a document is mandatory in the context of the first sentence of the definition of a technical regulation in two instances, *EC – Asbestos* and *EC – Sardines*. It has not addressed this question in the context of the second sentence. In the context of the first sentence, which deals with documents that lay down product characteristics, the Appellate Body identified three criteria that must be met for a measure to fall within the definition of a technical regulation: (1) the document must apply to an identifiable product or group of products; (2) the document must lay down one or more product characteristics; and (3) compliance with the product characteristics must be mandatory to be marketed or sold.¹⁴⁵ In its report in *EC – Asbestos*, the Appellate Body elaborated on the third criteria:

¹⁴³ Mexico First Written Submission, paras. 196-202.

¹⁴⁴ Borrowing from the Appellate Body report in *EC – Asbestos*, the U.S. dolphin safe labeling provisions do not prescribe or impose one or more characteristics, features, qualities, attributes or other distinguishing marks on tuna products or otherwise lay down certain binding product characteristics for tuna products. The U.S. provisions likewise to not prohibit tuna products from possessing certain characteristics. Appellate Body Report, *EC – Asbestos*, para. 67.

¹⁴⁵ Appellate Body Report, *EC – Sardines*, para. 176; Appellate Body Report, *EC – Asbestos*, paras. 66-70.

The definition of a “technical regulation” in Annex 1.1 of the TBT Agreement also states that “compliance” with the “product characteristics” laid down in the “document” must be “mandatory.” A “technical regulation” must, in other words, regulate the “characteristics” of products in a binding or compulsory fashion. It follows that, with respect to products, a “technical regulation” has the effect of prescribing or imposing one or more “characteristics” - “features,” “qualities,” “attributes,” or other “distinguishing mark.”

“Product characteristics” may, in our view, be prescribed or imposed with respect to products in either a positive or a negative form. That is, the document may provide, positively, that products must possess certain “characteristics”, or the document may require, negatively, that products must not possess certain “characteristics.”. In both cases, the legal result is the same: the document “lays down” certain binding “characteristics” for products, in one case affirmatively, and in the other by negative implication.¹⁴⁶

The Appellate Body, thus, described a document which lays down product characteristics with which compliance is mandatory as one that regulates the characteristics of a product in a “binding or compulsory fashion” and has the effect of “prescribing or imposing” one or more characteristics in either affirmatively or by negative implication. If extrapolated to the second sentence in the definition of a technical regulation, this would mean that a document dealing with labeling requirements with which compliance is mandatory is one that has the effect of prescribing or imposing labeling requirements affirmatively or by negative implication.

132. The U.S. dolphin safe labeling provisions do not prescribe or impose labeling requirements. In particular, the provisions do not require tuna products to be labeled or to contain certain information on a label. As explained in Section III, it is perfectly legal to sell tuna products in the United States that are not dolphin safe and that do not bear the dolphin safe label. In fact, the 1947 GATT panel reached the same conclusion when examining the DPCIA: “The Panel noted that the labelling provisions of the DPCIA do not restrict the sale of tuna products; tuna products can be sold freely both with and without the “Dolphin Safe” label. Nor do these provisions establish requirements that have to be met in order to obtain an advantage from the government.”¹⁴⁷

133. In this regard, the U.S. dolphin safe labeling provisions are fundamentally different from the measures the Appellate Body considered in *EC – Sardines* and *EC – Asbestos*. In *EC – Sardines*, the measure at issue laid down a requirement that in order to be marketed in the EC the product “preserved sardines” must be prepared exclusively from fish of the species *Sardina pilchardus*.¹⁴⁸ In *EC – Asbestos*, the measure at issue prohibited any product from containing

¹⁴⁶ Appellate Body Report, *EC – Asbestos*, paras. 67-68.

¹⁴⁷ GATT Panel Report, *US – Tuna Dolphin I*, para. 5.42.

¹⁴⁸ Appellate Body Report, *EC – Sardines*, para. 190.

asbestos fibers.¹⁴⁹ If these requirements were not met, in both cases, the products could not be marketed in the EC. By contrast, the U.S. dolphin safe labeling provisions do not require tuna products to be labeled or to include on a label indication of whether the tuna product is dolphin safe in order to be marketed in the United States.

134. The U.S. dolphin safe labeling provisions instead set forth a voluntary labeling scheme. Whether someone wants to indicate that a tuna product is dolphin safe is that person's choice. This is in contrast with labeling that is mandatory. Of course, the U.S. provisions provide that the label may be used only for tuna products that are in fact dolphin safe (i.e., for products containing tuna that was not caught during a trip in which purse seine nets were deployed on or to encircle dolphins and in a set in which no dolphins were killed or seriously injured). A voluntary labeling measure does not become a mandatory labeling requirement simply because the measure requires that what is stated on the label to be truthful.

135. That a measure may set out conditions under which a label may be used without being a technical regulation is confirmed by the definition of a standard. In particular, the definition of standard provides that a "document approved by a recognized body...with which compliance is not mandatory" may also include "labeling requirements."¹⁵⁰ The fact that standards may include "labeling requirements" does not convert the standard into a document with which compliance is mandatory. Indeed, inherent in the idea of a standard is that there are certain conditions to be met in order to meet the standard. The requirement to meet these conditions does not result in the standard becoming mandatory or a technical regulation – that would convert all labeling standards into technical regulations and render *inutile* the definition of standard. To the contrary, the definition of a standard makes clear that a standard, with which compliance is *not* mandatory, may address "labeling requirements." The difference, then, between a standard that addresses labeling requirements and a technical regulation that addresses labeling requirements is that the former concerns voluntary labeling schemes while the latter concerns mandatory labeling schemes.

136. Confirmation that the definition of a technical regulation only includes mandatory labeling requirements can be found in the decisions and recommendations of the TBT Committee. These decisions and recommendations make clear that the definition of a technical regulation in Annex 1 of the TBT Agreement applies only to mandatory labeling requirements and does not apply to voluntary labeling requirements. In particular, in a November 2003 decision of the TBT Committee, Members formally adopted the following decision:

In conformity with Article 2.9 of the [TBT] Agreement, Members are obligated to notify all mandatory labelling requirements that are not based substantially on a relevant international standard and that may have a significant effect on the trade of other Parties. This obligation is not dependent upon the kind of information

¹⁴⁹ Appellate Body Report, *EC – Asbestos*, para. 72.

¹⁵⁰ TBT Agreement, Annex I.

which is provided on the label, whether it is in the nature of a technical specification or not.¹⁵¹

Article 2.9 of the TBT Agreement requires Members to “notify other Members ... of the products to be covered by [a] proposed technical regulation.” In a November 1997 decision of the TBT Committee, Members adopted the following recommendation:

In order to improve the transparency, acceptance of, and compliance with the Code [of Good Practice in Annex 3 of the TBT Agreement]...without prejudice to the views of Members concerning the coverage and application of the Agreement, the obligation to publish notices of draft standards containing voluntary labelling requirements under paragraph L of the Code is not dependent upon the kind of information provided in the label.¹⁵²

Paragraph L of the Code of Good Practice in Annex 3 of the TBT Agreement obligates Members' central government standardizing bodies to publish proposed standards and provide a period of at least 60 days for the submission of comments.

137. The above decision and recommendation of the TBT Committee provide further evidence that the obligations for, on the one hand, mandatory labeling requirements and, on the other hand, voluntary labeling requirements are set out in separate provisions of the TBT Agreement. While mandatory labeling requirements must be notified under Article 2.9 of the TBT Agreement -- which addresses technical regulations -- voluntary labeling requirements must be published under Paragraph L of Annex 3 of the TBT Agreement -- which addresses standards.¹⁵³

138. Because the U.S. dolphin safe labeling provisions are not technical regulations, they cannot be inconsistent with the obligation set out in Article 2.1, 2.2 or 2.4 of the TBT Agreement concerning technical regulations. Accordingly, Mexico's claims with respect to these articles are without merit. Mexico, however, has set out a number of claims and arguments premised on its assertion that the U.S. dolphin safe labeling provisions are technical regulations. The United States addresses these claims and arguments below, without prejudice to the threshold issue that the U.S. dolphin safe labeling provisions do not constitute technical regulations.

2. The U.S. measures are not inconsistent with Article 2.1 of the TBT Agreement

¹⁵¹ Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade Since 1 January 1995, G/TBT/1/Rev.9, para.5 (page 17 “labelling requirements”).

¹⁵² Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade Since 1 January 1995, G/TBT/1/Rev.9, para. 8 (page 22 “publishing of a Notice (Paragraph L)); First Triennial Review of the Implementation and Operation of the TBT Agreement, G/TBT/5, 19 November 1997, para. 12(c).

¹⁵³ The TBT Agreement does not contain an obligation for Members (or their central government standardizing bodies) to notify standards to the WTO.

139. Article 2.1 of the TBT Agreement states:

Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favorable than that accorded to like products of national origin and to like products originating in any other country.

140. The analysis under Article 2.1 of the TBT Agreement is similar to the analysis of national treatment and most favored nation provision of the GATT 1994, which are described above. Mexico relies solely on the arguments it makes regarding the consistency of the U.S. measures with Articles I:1 and III:4 of the GATT 1994 for its arguments under TBT Article 2.1. The United States has articulated why Mexico's arguments under Articles I:1 and III:4 of the GATT 1994 fail in Sections IV.B.2 and IV.B.1 above, and Mexico's arguments under TBT Article 2.1 fail for the same reasons.

141. Thus, Mexico has failed to establish that the U.S. measures are inconsistent with Article 2.1 of the TBT agreement.

3. The U.S. dolphin safe labeling provisions are not inconsistent with Article 2.2 of the TBT Agreement

142. Article 2.2 of the TBT Agreement provides:

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.

143. The first sentence of Article 2.2. establishes the general rule that Members shall ensure that technical regulations do not create unnecessary obstacles to international trade, while the second sentence of Article 2.2 explains that "for this purpose" technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective." In other words, the second sentence explains what the first sentence means. Article 2.2 also contains a non-exhaustive list of examples of "legitimate objectives" including protection of animal life or health or the environment and prevention of deceptive practices.

144. The preamble to the TBT Agreement recognizes:

that no country should be prevented from taking measures necessary to ensure the quality of its exports, or *for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate*, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement.¹⁵⁴

This preambular paragraph provides relevant context with respect to the words "legitimate objective" in Article 2.2. In particular, it makes clear that each Member has the right to decide for itself which legitimate objectives to pursue and to take measures to meet those objectives "at the levels it considers appropriate," including with respect to measures to protect animal life or health or the environment and to prevent deceptive practices.

145. Mexico argues that the U.S. dolphin safe labeling provisions are more trade-restrictive than necessary to meet a legitimate objective and therefore are inconsistent with Article 2.2 of the TBT Agreement.¹⁵⁵ Mexico's arguments should be rejected. As elaborated below, the U.S. dolphin safe labeling provisions fulfill a legitimate objective and are not more trade-restrictive than necessary to meet those objectives.

(a) The U.S. dolphin safe labeling provisions are to fulfill a legitimate objective

146. The U.S. dolphin safe labeling provisions are to fulfill a legitimate objective within the meaning of Article 2.2 of the TBT Agreement. The objectives of the U.S. dolphin safe labeling provisions are (1) ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins; and (2) to the extent that consumers choose not to purchase tuna without the dolphin safe label, the U.S. provisions ensure that the U.S. market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins.¹⁵⁶

147. While Mexico appears to concede that the U.S. provisions have as their objective "preserv[ing] dolphin stocks in the course of tuna fishing operations in the ETP,"¹⁵⁷ Mexico overlooks the objective of the U.S. provisions to ensure that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects

¹⁵⁴ TBT Agreement, 6th preambular paragraph.

¹⁵⁵ Mexico First Written Submission, paras. 204-225.

¹⁵⁶ See Section III.A.1; see also note 158.

¹⁵⁷ Mexico First Written Submission, para. 208.

dolphin.¹⁵⁸ As a consequence, Mexico does not address whether the U.S. provisions fulfill this objective and has not established a *prima facie* case that the U.S. dolphin safe labeling provisions are more trade-restrictive than necessary to fulfill that objective. Accordingly, for this reason alone Mexico's claims under Article 2.2 should be rejected.

**(i) Preventing consumer deception and protecting dolphins
are legitimate objectives**

148. With respect to the objective of protecting dolphins, Mexico argues that this is not a legitimate objective, in particular because it “trade[s] off the protection of the life or health of other animals and the protection of the environment in general against the professed protection of the life or health of a single marine species in the confines of the ETP.”¹⁵⁹ In other words, Mexico appears to believe that the objective of protecting dolphins is not legitimate because the United States should have another objective: preserving other marine species and the environment of the ETP as a whole.

149. It is not for Mexico, however, to decide what policy objectives the United States should pursue. As reviewed above, this is made clear by the text of Article 2.2 interpreted in the context of the preamble of the TBT Agreement. The panel in *EC – Sardines* reached the same conclusion.¹⁶⁰ Governments must constantly make policy decisions among competing priorities. Nothing in the TBT Agreement dictates that Members must prioritize one set of policy objectives over another. The United States disagrees with the implication of Mexico's suggestion that it is not concerned about, and does not take measures to protect, other marine species or the environment. However, even assuming *arguendo* that such goals conflict, the decision over which to pursue, and to what level, is completely for the United States to make. Indeed, it is surprising that Mexico would advance this argument. If Mexico's assertions are correct that FADs are harmful to marine species other than dolphins, in encouraging its fleet to set on dolphins, Mexico itself has chosen to “trade off” protection of dolphins in favor of other marine species.

¹⁵⁸ It is odd that Mexico overlooked this objective as the U.S. provisions clearly state: “It is a violation of section 45 of title 15 for any producer, importer, exporter, distributor or seller of any tuna productto include on the label of that product the term ‘dolphin safe’ or *any other term or symbol that falsely claims or suggests* that the tuna contained in the product were harvested using a method of fishing that is not harmful to dolphin” unless the conditions set out in the DPCIA are met. DPCIA, 16 U.S.C. § 1385(d)(1), Exhibit US-5 (emphasis added). Section 45 of title 15 of the U.S. Code states in relevant part: “Unfair methods of competition in or affecting commerce, and *unfair or deceptive acts or practices in or affecting commerce*, are hereby declared unlawful.” 15 U.S.C. § 45, Exhibit US-48 (emphasis added). The findings of the DPCIA also identify that “consumers would like to know if the tuna they purchase is falsely labeled as to the effect of the harvesting of tuna on dolphins.” DPCIA, 16 U.S.C. § 1385(b), Exhibit US-5. The title of the DPCIA is also revealing: “Dolphin Protection Consumer Information Act.” 16 U.S.C. § 1385(a), Exhibit US-5(emphasis added).

¹⁵⁹ Mexico First Written Submission, para. 209.

¹⁶⁰ Panel Report, *EC – Sardines*, para. 7.120 (“Article 2.2 and this preambular text affirm that it is up to the Member[] to decide which policy objectives they wish to pursue and the levels at which they wish to pursue them”).

150. Mexico’s argument also ignores the fact that the United States has in place a number of measures to protect other marine species and the environment generally. The U.S. dolphin safe labeling provisions, however, seek to protect dolphins; the U.S. provisions need not also protect every other marine species and the environment as a whole to serve a legitimate objective.

151. Further, Mexico’s argument that protecting dolphins is not a legitimate objective belies the text of Article 2.2 of the TBT Agreement. Article 2.2 expressly includes “protection of ... animal ... life or health, or the environment”¹⁶¹ in its illustrative list of legitimate objectives. Dolphins are animals and protecting them is therefore a legitimate objective expressly contemplated under Article 2.2. Further, as dolphins comprise part of the environment, protecting dolphins also constitutes protecting the environment.

152. As explained above, in addition to protecting dolphins, the U.S. dolphin safe labeling provisions have as their objective ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins. This objective is also one that falls within the illustrative list in Article 2.2. In particular, Article 2.2 refers to “prevention of deceptive practices.”¹⁶² By setting out conditions under which tuna products may be labeled dolphin safe, the U.S. provisions are intended to prevent deceptive practices by ensuring that tuna products are not falsely or misleadingly labeled dolphin safe when they are caught using a fishing practice that adversely affects dolphins.

(ii) The U.S. dolphin safe labeling provisions are to fulfill a legitimate objective

153. Mexico argues, in the alternative, that even if the U.S. dolphin safe labeling provisions “could in principle be found to fulfill a legitimate objective,” the U.S. measures do not fulfill that objective.¹⁶³ Mexico’s argument is without merit.

154. As Mexico suggests, the word “fulfil” in Article 2.2 means to carry out or perform and thus the relevant question under Article 2.2. is whether the U.S. dolphin safe labeling provisions are more trade-restrictive than necessary to perform or carry out their objectives.¹⁶⁴ As elaborated below, the answer to that question is no.

¹⁶¹ TBT Agreement, Article 2.2.

¹⁶² The panel in *EC – Sardines* recognized “market transparency” and “consumer protection” as legitimate objectives of the measures at issue in that dispute. Panel Report, *EC – Sardines*, para. 7.123.

¹⁶³ Mexico First Written Submission, para. 211.

¹⁶⁴ Mexico First Written Submission, para. 206. Mexico cites the following definition of “fulfil”: “bring to consummation; perform, carry out (a task); comply (with conditions). The United States notes that another dictionary similarly defines “fulfil” as follows: “[c]arry out, perform, do (something prescribed); obey or follow (a command, the law, etc.). *The New Shorter Oxford English Dictionary* (4th ed. 1993), p. 1039. These definitions both suggest that the ordinary meaning of the word “fulfil” is to carry out or perform.

155. First, the U.S. dolphin safe labeling provisions help ensure that consumers are not misled or deceived about whether the tuna products they are considering purchasing contain tuna that was caught in a manner that adversely affects dolphins. The U.S. provisions accomplish this by limiting use of the dolphin safe label to tuna products that contain tuna that was not caught during a trip in which purse seine nets were intentionally deployed on or used to encircle dolphins to catch the tuna or in a set in which dolphins were killed or seriously injured.

156. As elaborated in Section III.B.2, setting on dolphins to catch tuna adversely affects on dolphins. By limiting use of the dolphin safe label to tuna products that contain tuna that was not caught in a manner that adversely affects dolphins, the U.S. dolphin safe labeling provisions ensure that when consumers purchase tuna products that are labeled dolphin safe they are not misled or deceived about the effect of the harvesting of that tuna on dolphins. In other words, the U.S. dolphin safe labeling provisions help ensure that tuna products labeled dolphin safe are in fact dolphin safe.

157. As also elaborated in Section III, the DPCIA came about as a result of consumer confusion and concern about whether the tuna they were purchasing was in fact dolphin safe. The U.S. dolphin safe labeling provisions addressed this confusion and concern by providing clear conditions under which tuna products may be labeled dolphin safe and by prohibiting use of a dolphin safe label for tuna products that contain tuna that was caught in a manner that adversely affects dolphins. They help ensure that consumers are not misled or deceived about the dolphin safe status of tuna products.

158. Second, the U.S. dolphin safe labeling provisions help protect dolphin populations. The U.S. provisions accomplish this by ensuring that the dolphin safe label is not used on tuna products that contain tuna that was caught by setting on dolphins. To the extent customers choose not to purchase tuna products without the dolphin safe label, the U.S. provisions help ensure that the U.S. market is not used to encourage fishing fleets to set on dolphins. As the practice of setting on dolphins to catch tuna in the ETP decreases in frequency, the associated adverse effects on dolphin populations decrease as well.

159. In this regard, Mexico's contention that the U.S. dolphin safe labeling provisions "will not influence or modify the conduct of the ETP fishery" is unfounded. In fact, the demand for tuna products that do not contain tuna that was caught by setting on dolphins is what prompted the U.S. fleet to abandon this fishing technique, as well as what may have prompted Ecuador's fleet to abandon this technique in recent years.¹⁶⁵ Ecuador, like the U.S. fleet, had previously used the technique of setting on dolphins to catch tuna in the ETP. While the U.S. fleet largely chose to fish outside the ETP, Ecuador's fleet continues to fish there, employing techniques other than setting on dolphins to catch tuna, including yellowfin tuna. The U.S. provisions also discourage

¹⁶⁵ Compare 2008 DML Allocation, Exhibit, US-49 Request with 2010 DML Allocation, Exhibit US-50 (showing that in 2006 Ecuador requested DMLs for 3 large purse seine vessels and in 2010 requested none). As noted above, vessels are not permitted to set on dolphins to catch tuna without requesting and receiving a DML.

fishing boats from other countries with an interest in exporting to the United States from adopting the technique of setting on dolphins, as any tuna so caught would be ineligible for the dolphin safe label.

160. Mexico also argues that the U.S. dolphin safe labeling provisions do not meet their objective of protecting dolphins because they have the effect of “withdrawing the economic incentive for countries and fishing fleets to comply with the AIDCP” and undermine the AIDCP, thereby detracting from dolphin protection.¹⁶⁶ This is not supported by the facts. First, the AIDCP was concluded two years after the 1997 amendments to the DCPIA were enacted. Thus, the parties to the AIDCP knew at the time that agreement was signed that it provided for the possibility that the U.S. dolphins safe labeling provision would continue to prohibit use of the dolphin safe label for tuna products that contain tuna that was caught by setting on dolphins. Yet, parties nonetheless entered into the AIDCP. Second, the current U.S. dolphin safe labeling provisions have been in force since 1997, with all parties including Mexico generally acting in compliance with their obligations under the AIDCP. This includes the obligations to ensure that parties’ respective fishing fleets undertake measures to protect dolphins when fishing for tuna in the ETP. Despite the claim that the U.S. dolphin safe labeling provisions “withdrew” the incentive for countries to continue to adhere to their obligations under the AIDCP, the parties have continued to comply with and participate in the Agreement, indicating there may be other incentives motivating participation that have not been highlighted.

161. Mexico makes a number of other unsupported assertions in an effort to advance its argument that the U.S. dolphin safe labeling provisions do not fulfill the objective of preserving dolphin stocks, including that U.S. dolphin safe labeling provisions (1) “block imports of tuna products” from AIDCP signatories and “thereby protect the U.S. tuna industry,” (2) are inconsistent with the AIDCP and contrary to the Panama Declaration, and (3) do not add to the protection afforded dolphins under the AIDCP.¹⁶⁷ These assertions are also unfounded and addressed elsewhere in this submission.¹⁶⁸

(b) The U.S. dolphin safe labeling provisions are not more trade-restrictive than necessary to fulfill a legitimate objective

162. Article 2.2 of the TBT Agreement provides that technical regulations shall not be “more trade-restrictive than necessary” to fulfill a legitimate objective. As elaborated below, the U.S. dolphin safe labeling provisions are not more trade-restrictive than necessary to meet their objectives.

¹⁶⁶ Mexico First Written Submission, para. 211.

¹⁶⁷ Mexico First Written Submission, para. 211.

¹⁶⁸ See Section III.B.5 (regarding the Panama Declaration and AIDCP), Section III.C.1 (regarding Mexican exports of tuna to the United States), Section IV.D.3(b) (U.S. provisions are not more trade-restrictive than necessary).

163. The TBT Agreement does not define the phrase “more trade-restrictive than necessary” and it has not been reviewed by a panel or the Appellate Body. Based on the text of Article 2.2, two elements must be shown for a measure to be considered more trade-restrictive than necessary: (1) the measure must be trade-restrictive; and (2) the measure must restrict trade more than is necessary to fulfill the measure’s legitimate objective.

164. With respect to the first element (and applying the customary rules of treaty interpretation reflected in Articles 31 and 32 of the Vienna Convention), the ordinary meaning of the word “restrictive” is “having the nature or effect of a restriction; imposing a restriction.”¹⁶⁹ “Restriction” is defined as “a thing that restricts someone or something...the act of restricting someone or something.”¹⁷⁰ “Restrict” is defined as “to limit, bound, confine...restrain by prohibition, prevent.”¹⁷¹ A measure that is trade-restrictive, therefore, could include one that restricts trade, i.e., that limits, prevents or confines trade, or restrains it by prohibition.

165. Based on its review of prior panel and Appellate Body reports concerning interpretation of the word “restriction” in Articles XI and XIII of the GATT 1994, Mexico concludes that “measures that are ‘trade-restrictive’ include those that impose any form of limitation of imports, discriminate against imports or deny competitive opportunities to imports.”¹⁷² The United States agrees that measures that impose limits on imports or discriminates against them would meet the definition of a measure that is “trade-restrictive.”

166. With respect to the second element, the ordinary meaning of the word “necessary” is “that cannot be dispensed with or done without; requisite, essential, needful... requiring to be done; that must be done.”¹⁷³ A measure that is “more” trade-restrictive than “necessary” is therefore a measure that restricts trade more than is needed or required to fulfill the measure’s objective. The word “more” implies a comparison. In other words, there is another measure that can fulfill the legitimate objective that would restrict trade less. This comparison in turn implies that other reasonably available measures that fulfill the measure’s legitimate objective should be examined to determine whether the measure at issue is “more” than what is required or necessary to fulfill that measure’s objective.

167. In addition to the ordinary meaning of a term, the customary rules of interpretation also involve looking at the context. One important element of context here is Article 5.6 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) which includes a provision similar to Article 2.2 of the TBT Agreement. That provision provides in relevant part that “when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such

¹⁶⁹ *New Shorter Oxford English Dictionary* (1993), p. 2569.

¹⁷⁰ *New Shorter Oxford English Dictionary* (1993), p. 2569.

¹⁷¹ *New Shorter Oxford English Dictionary* (1993), p. 2569.

¹⁷² Mexico First Written Submission, para. 217.

¹⁷³ *New Shorter Oxford English Dictionary* (1993), p. 1895.

measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.”¹⁷⁴ A footnote to Article 5.6 clarifies that “a measure is not more trade restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade.”¹⁷⁵ Article 5.6 provides relevant context for the interpretation of Article 2.2 of the TBT Agreement within the meaning of Article 31.2 of the Vienna Convention and confirms that determining whether a measure is “more trade-restrictive than necessary” within the meaning of Article 2.2 of the TBT Agreement involves determining whether there is an alternative measure that could fulfill the measure’s objective that is significantly less trade-restrictive.

168. This interpretation is confirmed by a December 15, 1993 letter from the Director-General of the GATT to the Chief U.S. Negotiator concerning the application of Article 2.2 of the TBT Agreement. That letter explains that while “it was not possible to achieve the necessary level of support for a U.S. proposal [concerning a clarifying footnote to Article 2.2 and 2.3 of the TBT Agreement] . . . it was clear from our consultations at expert level that participants felt it was obvious from other provisions of the [TBT] Agreement that the Agreement does not concern itself with insignificant trade effects nor could a measure be considered more trade restrictive than necessary in the absence of a reasonably available alternative.”¹⁷⁶ This letter provides supplemental means of interpretation within the meaning of Article 32 of the Vienna Convention, in particular as circumstances of the TBT Agreement’s conclusion, that confirms the meaning derived from the ordinary meaning, in context, and in light of the object and purpose of the TBT Agreement.¹⁷⁷

169. Thus, to establish that the U.S. dolphin safe labeling provisions are more trade-restrictive than necessary, Mexico must establish that there is a reasonably available alternative measure that fulfils the provisions’ objectives that is significantly less trade-restrictive. Mexico has failed to do so.

¹⁷⁴ SPS Agreement, Article 5.6.

¹⁷⁵ SPS Agreement, Article 5.6, footnote 3. In *Australia-Salmon*, the Appellate Body confirmed that, in order to find a violation of SPS Article 5.6, three elements must be established. The three elements are that “there is an SPS measure which: (1) is reasonably available taking into account technical and economic feasibility; (2) achieves the Member’s appropriate level of sanitary or phytosanitary protection; and (3) is significantly less restrictive to trade than the SPS measure contested.” The Appellate Body observed that the three prongs are cumulative in nature, in that in order to establish inconsistency all of them have to be satisfied. Appellate Body, *Australia Salmon*, para. 194. And if any of those elements are not fulfilled, the measure in dispute would be consistent with Article 5.6. Appellate Body, *Australia Salmon*, para. 194.

¹⁷⁶ Letter from Peter D. Sutherland, Director-General of the GATT, to Ambassador John Schmidt, Chief U.S. Negotiator (December 15, 1993), Exhibit US-41.

¹⁷⁷ Vienna Convention, Article 32.

170. First, Mexico argues that the U.S. dolphin safe labeling provisions are more trade-restrictive than necessary to fulfill their objective because the AIDCP fulfills the objective of preserving dolphin populations and the U.S. provisions do not further contribute to that objective.¹⁷⁸ Mexico is incorrect. Neither the AIDCP itself nor measures implemented pursuant to it constitute a “reasonably available alternative” that could fulfill the legitimate objectives of the U.S. dolphin safe labeling provisions. While the United States agrees that the AIDCP has made an important contribution to dolphin protection in the ETP, as reviewed in Section III, despite the conservation measures called for under the AIDCP, dolphin populations remain depleted and have not recovered. The U.S. dolphin safe labeling provisions further contribute to protecting dolphins by ensuring that the U.S. market is not an incentive for fishing fleets to set on dolphins to catch tuna – a technique that adversely affects dolphins.

171. Viewed another way, the U.S. dolphin safe labeling provisions together with the measures called for under the AIDCP and other provisions of U.S. law form part of a comprehensive U.S. strategy to protect dolphins.¹⁷⁹ Were the United States to substitute one aspect of this comprehensive strategy for another – for example forgo the dolphin safe labeling provisions in lieu of measures called for under the AIDCP – this would reduce the overall ability of the United States to protect dolphins.¹⁸⁰

172. Mexico’s argument also ignores that the U.S. dolphin safe labeling provisions also have as their objective ensuring that consumers are not misled or deceived about the dolphin safe status of tuna products. As reviewed in Section III.C.2, consumers have a preference for tuna products that do not contain tuna caught by setting on dolphins and want to know whether the tuna products they are considering purchasing contain tuna that was caught in a manner that adversely affects dolphins. Eliminating the U.S. dolphin safe labeling provisions in lieu of the AIDCP would not fulfill the objective of ensuring that consumers are not misled or deceived about whether or not tuna products contain tuna that was caught in a manner that adversely affects dolphins.

173. Second, the U.S. dolphin safe labeling provisions have a minimal impact on trade. As a voluntary labeling scheme, the U.S. provisions do not require tuna or tuna products exported to, or sold in, the United States to be dolphin safe or to be labeled dolphin safe. And, nothing in the U.S. provisions prohibits tuna products that are not dolphin safe and that are not labeled as such from being exported to, or sold in, the United States. In fact, the United States imported US\$ 13

¹⁷⁸ Mexico First Written Submission, para. 224.

¹⁷⁹ The Appellate Body has recognized that a measure that is the subject of a dispute may be one part of a comprehensive strategy to achieve a particular objective and that a measure is not prevented from being “necessary” simply because the measure acting by itself does not achieve that objective. Appellate Body Report, *Brazil – Tyres*, paras. 154-155.

¹⁸⁰ The Appellate Body, however, has rejected that measures – that a responding party already has in place may as part of a comprehensive strategy to achieve a particular objective – may serve as reasonably available alternative measures to the challenged measure, in particular where substitution of one element of a comprehensive strategy for another would lessen the responding party’s ability to fulfill its legitimate objectives. Appellate Body, *Brazil – Tyres*, para. 172.

million worth of tuna and tuna products from Mexico 2009, and while some of this may in fact have been eligible for the dolphin safe label, no Mexican tuna was sold in the United States with a dolphin safe label. Nor do the U.S. provisions discriminate against imports, as reviewed in Section IV.B.¹⁸¹

174. To the extent the U.S. dolphin safe labeling provisions have had an impact on trade, it is not because those measures themselves prohibit or otherwise impose limitations on imports. It is because consumers have a preference for tuna products that contain tuna that is not caught by setting on dolphins.

175. In sum, Mexico has failed to establish each element of its Article 2.2 claim. In particular, aside from the fact that Article 2 does not apply since the U.S. dolphin safe labeling provisions are not a technical regulation, Mexico has not established that the objectives of the U.S. provisions are not legitimate nor are more trade-restrictive than necessary. For these reasons, Mexico has failed to establish that the U.S. dolphin safe labeling provisions are more trade-restrictive than necessary to fulfill a legitimate objective and therefore has failed to establish that the U.S. provisions are inconsistent with Article 2.2.

4. The U.S. dolphin safe labeling provisions are not inconsistent with Article 2.4 of the TBT Agreement

176. Article 2.4 of the TBT Agreement states:

Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

177. Mexico argues that the U.S. dolphin safe labeling provisions are inconsistent with Article 2.4 because they are not based on a relevant international standard that would not be ineffective or inappropriate to meet the objectives of the U.S. dolphin safe labeling provisions.¹⁸² Mexico contends that a definition of “dolphin safe” applicable to two AIDCP resolutions constitutes a relevant international standard. Mexico’s arguments should be rejected.

¹⁸¹ The U.S. provisions also do not “block” imports of tuna products, as Mexico contends. Mexico First Written Submission, para. 211. As noted in Section III.C, the United States imported \$US 13 million worth of tuna from Mexico in 2009 and imports from other countries totaled \$US 1.15 billion in 2009, including US\$ 139 million from other countries whose fleets fish in the ETP.

¹⁸² Mexico First Written Submission, paras. 228.

178. First, the AIDCP resolutions Mexico cites does not set out a relevant international standard. Second, use of the definition of “dolphin safe” in the AIDCP resolution would not be effective or appropriate to fulfill the objectives of the U.S. dolphin safe labeling provisions. As the complaining party, Mexico bears the burden of proof with respect to its Article 2.4 claim. As the Appellate Body has explained, this includes the burden of establishing that the “relevant international standard” Mexico identifies would be effective and appropriate in meeting the objectives pursued by the U.S. dolphin safe labeling provisions.

(a) The definition of “dolphin safe” in the AIDCP tuna tracking resolution is not a relevant international standard

179. The TBT Agreement defines a standard as a “[d]ocument approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.”¹⁸³

180. The TBT Agreement does not define “recognized body” but does specify that terms presented in ISO/IEC Guide 2: 1991 shall “when used in [the TBT Agreement], have the same meaning as given in the definitions in the said Guide.”¹⁸⁴ ISO/IEC Guide 2: 1991 defines a “body” as a “legal or administrative entity that has specific tasks and composition”¹⁸⁵ and a “standardizing body” as “a body that has recognized activities in standardization.”¹⁸⁶ It does not define “recognized body.” However, Annex 3 of the TBT Agreement, which sets out Members’ obligations with respect to standards, applies to Members’ central government “standardizing bodies.” Thus, Annex 3 read together with the definition of standardizing body in ISO/IEC Guide 2: 1991 suggests that a “recognized body” for purposes of the TBT Agreement is one that has “recognized activities in standardization.”

181. As the “relevant international standard” for purpose of its claims under Article 2.4, Mexico cites the definition of “dolphin safe” in an AIDCP resolution: “Resolution to Adopt the Modified System for Tracking and Verification of Tuna.”¹⁸⁷ This resolution states that the “terms used in this document are defined as follows” and includes in the list of those terms a definition for “dolphin safe.” That definition states: “*Dolphin safe* tuna is tuna captured in sets in which there is no mortality or serious injury of dolphins.”¹⁸⁸ Mexico also cites a second AIDCP

¹⁸³ TBT Agreement, Annex 1.

¹⁸⁴ TBT Agreement, Annex 1.

¹⁸⁵ ISO/IEC Guide 2: 1991, paragraph 4.1.

¹⁸⁶ ISO/IEC Guide 2: 1991, paragraph 4.3.

¹⁸⁷ Mexico First Written Submission, paras. 229 & fn.149.

¹⁸⁸ AIDCP Resolution to Adopt a Revised System for Tracking and Verifying Tuna (June 20, 2001), Article 1(a), Exhibit Mex-55.

resolution: “Resolution to Establish Procedures for AIDCP Dolphin Safe Tuna Certification.”¹⁸⁹ Mexico characterizes this resolution as setting out the “AIDCP’s rules on dolphin safe certification.”¹⁹⁰ The resolution defines the term “AIDCP Dolphin Safe Tuna Certificate” for purposes of the resolution as a “[d]ocument issued by the competent national authority, evidence of the dolphin-safe status of tuna and tuna products, in accordance with the AIDCP System for Tracking and Verification of Tuna.”¹⁹¹

182. As elaborated below, the definition of “dolphin safe” in the AIDCP tuna tracking resolution¹⁹² does not constitute a relevant international standard within the meaning of Article 2.4 of the TBT Agreement as it is not (1) a standard; (2) international; or (3) relevant.¹⁹³

(i) The definition in the AIDCP tuna tracking resolution is not a standard

183. The definition in the AIDCP tuna tracking resolution does not meet the definition of a “standard” in Annex 1 of the TBT Agreement. First, it does not set out “rules, guidelines or characteristics for products or related processes and production methods;”¹⁹⁴ it sets out a definition for purposes of an intergovernmental agreement. This definition does not itself establish any rules regarding the characterization of tuna; it simply defines a term. While the tuna tracking resolution more broadly seek to establish procedures to track tuna, Mexico does not appear to be arguing that the resolution constitutes the “rules” at issue but that the definition itself sets out such “rules”.¹⁹⁵

184. Second, the definition of “dolphin safe” in the tuna tracking resolution is not contained in a “document approved by a ... body.”¹⁹⁶ The AIDCP tuna tracking resolution (as well the AIDCP dolphin safe certification resolution) is a document approved by the parties to the AIDCP, and neither the AIDCP nor the parties to it constitute a “body” (i.e. a “legal or administrative entity that has specific tasks and composition”).¹⁹⁷

¹⁸⁹ Mexico First Written Submission, para. 230.

¹⁹⁰ Mexico First Written Submission, para. 230.

¹⁹¹ AIDCP Resolution to Establish Procedures for AIDCP Dolphin Safe Tuna Certification (June 20, 2001), Article 1, Exhibit Mex-56.

¹⁹² The definition of “AIDCP dolphin safe tuna certificate” is also not a relevant international standard, to the extent Mexico is arguing that it is. Mexico’s submission is not clear on this point. *See, e.g.*, Mexico First Written Submission, para. 235.

¹⁹³ Neither does the AIDCP resolution on dolphin safe certification, to the extent Mexico is arguing that it does. Mexico’s submission is not clear on this point. *See, e.g.*, Mexico First Written Submission, para. 235.

¹⁹⁴ TBT Agreement, Annex 1, para. 2.

¹⁹⁵ Mexico First Written Submission, paras. 229, 234.

¹⁹⁶ TBT Agreement, Annex 1, para. 2.

¹⁹⁷ Mexico appears to simply assume that the AIDCP is an “organization.” Mexico First Written Submission, para. 238. The AIDCP, however, is an agreement *not* an organization. AIDCP, Exhibit Mex-11.

185. Third, assuming *arguendo* that the AIDCP was a “body” it does not have recognized activities in standardization and, therefore, would not constitute a “recognized” body.¹⁹⁸ In this regard, the objectives of the AIDCP and the activities parties take pursuant to it are fundamentally different from those of bodies such as the Codex Alimentarius Commission (Codex) or ASTM International that have as their core function the development of standards.¹⁹⁹

(ii) The definition in the AIDCP tuna tracking resolution is not international

186. The definition in the AIDCP tuna tracking resolution also does not qualify as “international.”²⁰⁰ That resolution (and the one on dolphin safe certification) were adopted by the parties to the AIDCP. Only 14 countries are party to the AIDCP and although the AIDCP provides that other countries may accede to the agreement, it limits such countries to those countries: (i) with a coastline bordering the ETP; (ii) that are a member of the IATTC; or (iii) whose vessels fished for tuna in the ETP between May 21, 1998 and May 14, 1999.²⁰¹ Therefore, only a limited number of countries participated in the adoption of the AIDCP resolutions, and the AIDCP by its terms limits those who were eligible to do so.

187. The fact that the AIDCP resolutions were adopted by a limited number of countries and the AIDCP limits the countries that may accede to it, precludes the AIDCP resolutions from qualifying as an “international standard” under the TBT Agreement. The TBT Agreement does not define the term “international standard.” This term, however, is defined in ISO/IEC Guide 2: 1991 as “[s]tandard that is adopted by an international standardizing/standards organization and made available to the public,”²⁰² and the TBT Agreement defines “international body” as a “body ...whose membership is open to the relevant bodies of at least all Members.”²⁰³ Read together, an international standard is one that is adopted by a body whose membership is open to the relevant

¹⁹⁸ This argument is further supported by the definition of “international standard” in ISO/IEC Guide 2: 1991. That definition states that an international standard is a standard “adopted by an international standardizing/standards organization and made available to the public.” ISO/IEC Guide 2: 1991, paragraph 3.2.1. Thus, only those standards adopted by a standardizing/standards body (i.e. bodies with recognized activities in standardization) are eligible to be considered “international standards.”

¹⁹⁹ See, e.g., ASTM International website, available at <<http://www.astm.org>> (“ASTM International is one of the largest voluntary standards development organizations in the world—a trusted source for technical standards for materials, products, systems, and services”); Codex website, available at <http://www.codexalimentarius.net/web/index_en.jsp> (“The Codex Alimentarius Commission was created in 1963 by FAO and WHO to develop food standards, guidelines and related texts such as codes of practice under the Joint FAO/WHO Food Standards Programme”).

²⁰⁰ Mexico makes no arguments that the AIDCP resolutions are “international.” It simply assumes that they are. See Mexico First Written Submission, paras. 232-239.

²⁰¹ AIDCP, Exhibit Mex-11, Article XXVI.

²⁰² ISO/IEC Guide 2: 1991, para. 3.2.1.

²⁰³ TBT Agreement, Annex 1, para. 4

bodies of at least all Members.²⁰⁴ The AIDCP, however, is not open for any Member to join. Therefore, neither the AIDCP nor resolutions adopted by its parties qualify as documents that were adopted by an international body (assuming *arguendo* that the AIDCP were a “body”) and they would not qualify as “international” within the meaning of Article 2.4 of the TBT Agreement.

(iii) The definition in the AIDCP tuna tracking resolution is not relevant

188. Further, the definition in the AIDCP tuna tracking resolution is not “relevant.” The ordinary meaning of the word relevant is “[b]earing on, connected with, pertinent to the matter in hand.”²⁰⁵ The Appellate Body in *EC – Sardines* agreed with the panel’s interpretation of “relevant” as “bearing on or relating to the matter at hand.”²⁰⁶ The panel in *EC – Sardines* examined whether the Codex standard at issue in that dispute bore upon, related to or pertained to the challenged EC regulation and concluded that because they both laid down marketing standards for sardines that the Codex standard was “relevant.”²⁰⁷

189. The definition Mexico cites, however, does not bear upon, relate to or pertain to the U.S. dolphin safe labeling provisions. First, as explained above, the definition is just that – a definition. It does not set out any rules, guidelines or characteristics for the *labeling* of tuna products. It, therefore, does not bear upon, relate to or pertain to the U.S. dolphin safe *labeling* provisions. It is also clear from the text of the tuna tracking resolution that the relevance of its definition of “dolphin safe” is limited to defining that term for purposes of the resolution.²⁰⁸

190. Second, the definition of “dolphin safe” in the tuna tracking resolution defines “dolphin safe” as tuna caught in a set in which no dolphins were observed killed or seriously injured.²⁰⁹ The U.S. dolphin safe labeling provisions, however, seek to ensure that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins, which includes not only whether the tuna was caught in a set in which dolphins were observed killed or seriously injured but whether dolphins were otherwise adversely affected.

²⁰⁴ Consensus is also required for a standard to qualify as an “international standard” under the TBT Agreement. See TBT Agreement, Annex 1, para. 2, explanatory note (stating that “standards prepared by the international standardization community are based on consensus”); see also *Decisions and Recommendations adopted by the Committee since 1 January 1995, G/TBT/1/Rev.9, 8 September 2008, Section IX (Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2, 5 and Annex 3 of the Agreement)* (setting out principles for the development of international standards including that international standards should be based on consensus).

²⁰⁵ *New Shorter Oxford English Dictionary* (1993), p. 2536.

²⁰⁶ Appellate Body Report, *EC – Sardines*, paras. 228-230.

²⁰⁷ Panel Report, *EC – Sardines*, paras. 7.68-7.70.

²⁰⁸ AIDCP Resolution for System for Tracking and Verifying Tuna, para. 1(a), Exhibit Mex-55 (stating that the “terms used in this document are defined as follows....”).

²⁰⁹ AIDCP Resolution for System for Tracking and Verifying Tuna, para. 1(a), Exhibit Mex-55.

In other words, the definition of “dolphin safe” in the tuna tracking resolution does not relate or pertain to the objective of the U.S. dolphin safe labeling provisions. It is therefore not relevant to the U.S. dolphin safe labeling provisions.

(b) The definition of “dolphin safe” in the AIDCP tuna tracking resolution would not be effective or appropriate to fulfill the objectives of the U.S. dolphin safe labeling provisions

191. Not only does the definition of “dolphin safe” in the AIDCP tuna tracking resolution not qualify as a “relevant international standard” but use of that definition would not be effective or appropriate to fulfill the objectives of the U.S. dolphin safe labeling provisions.²¹⁰ In particular, use of those definitions would not be effective or appropriate to ensure that consumers are not misled or deceived about whether the tuna products contain tuna that was caught in a manner that adversely affects dolphins. It would also not be effective at protecting dolphins at the level the United States considers appropriate.

192. Mexico argues that the definition of “dolphin safe” in the tuna tracking resolution is an effective and appropriate means for fulfilling the objective of the U.S. dolphin safe labeling provisions to protect dolphins.²¹¹ Mexico does not advance any arguments that, that definition is an effective or appropriate means to meet the objective of the U.S. provisions to ensure that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins. For this reason alone, Mexico has failed to establish a *prima facie* case that the U.S. dolphin safe labeling provisions are an effective and appropriate means to fulfill the objectives of those provisions and in turn that the U.S. dolphin safe labeling provisions are inconsistent with Article 2.4 of the TBT Agreement.²¹²

193. With respect to protecting dolphins, while the United States agrees that the AIDCP has made an important contribution to protecting dolphins in the ETP, it only addresses part of the problem - that is how to reduce dolphin mortality when setting on dolphins to catch tuna. Because it does not prohibit setting on dolphins to catch tuna, it does not ensure that no dolphins are in fact killed or seriously injured when dolphins are used to catch tuna (in fact, the AIDCP contemplates that up to 5000 dolphins may be killed using this technique per year) and it does not address other

²¹⁰ The Appellate Body in *EC – Sardines* agreed with the panel that a relevant international standard would be “effective” if it had the “capacity ... to accomplish the stated objectives” of the challenged measure, while be “appropriate” if it were *suited*... for the fulfillment of the stated objectives.” Appellate Body Report, *EC – Sardines*, para. 289; Panel Report, *EC – Sardines*, paras. 7.116-7.117.

²¹¹ Mexico First Written Submission, paras. 251-253.

²¹² As the Appellate Body in *EC – Sardines* confirmed, the complaining party has the burden of establishing that a relevant international standard would be both an effective and appropriate means to fulfill the objective of the challenged measures. Appellate Body, *EC – Sardines*, para. 289.

adverse effects of setting on dolphins to catch tuna. The same is true for the AIDCP resolutions Mexico cites.

194. The U.S. dolphin safe labeling provisions, however, seek not only to reduce observed dolphin mortality and serious injury, but also to address other adverse effects of setting on dolphins to catch tuna. The U.S. provisions seek to do this by encouraging fishing fleets to transition to techniques to catch tuna that do not involve setting on dolphins by prohibiting use of the dolphin safe label for tuna products that contain tuna that was caught during a trip in which purse seine nets were deployed or used to encircle dolphins. The U.S. provisions, in other words, have as their objective to protect dolphins in ways that go beyond the protections provided for under the AIDCP. Thus, relying solely on the AIDCP or its resolutions would not be an effective means of fulfilling the objective of the U.S. dolphin safe labeling provisions to protect dolphins above and beyond minimizing observed mortalities and serious injuries as a consequence of setting on dolphins to catch tuna. In this regard, it is important to emphasize that the TBT Agreement affords each Member the right to take measures to protect *inter alia* animal life or health and the environment *at the level* the Member considers appropriate.²¹³

195. Relying on the AIDCP or the AIDCP resolutions would also not be effective to fulfill the other objective of the U.S. dolphin safe labeling provisions to ensure that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins. They would not be effective because tuna caught in accordance with the AIDCP may be caught by setting on dolphins and tuna certified as dolphin safe under the AIDCP resolution on dolphin safe certification may also be caught by setting on dolphins. As reviewed in Section III, setting on dolphins to catch tuna adversely affects dolphins. Thus, relying on the AIDCP and AIDCP resolutions would not be effective in meeting the objective of the U.S. provisions to ensure that consumers have accurate information about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins.

196. The AIDCP and the resolution on tuna tracking would also not be appropriate to fulfill the objective of the U.S. provisions to ensure consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins as neither the AIDCP nor the resolution on tuna tracking addresses the labeling of tuna - that is, they are not suited for the purpose of ensuring that labels on tuna products contain accurate information about the dolphin safe status of those products.

197. In sum, Mexico has failed to establish that the U.S. dolphin safe labeling provisions are not based on a relevant international standard that would be effective and appropriate to fulfill the objectives of the U.S. provisions. In particular, Mexico has failed to establish that the definition

²¹³ TBT Agreement, preamble. This position, however, should not be understood to mean that the United States does not support the AIDCP or that it does not recognize the important contribution it has made to protecting dolphins in the ETP. It simply means that, in the U.S. view, more can be done, and the U.S. dolphin safe labeling provisions seek to do so.

of “dolphin safe” in the AIDCP tuna tracking resolution is a standard, that it is international and that it is relevant to the U.S. dolphin safe labeling provisions. Accordingly, Mexico has failed to establish that the U.S. dolphin safe labeling provisions are inconsistent with Article 2.4.

V. Conclusion

198. For the reasons stated above, the panel should reject Mexico’s claims that the U.S. dolphin safe labeling provisions are inconsistent with Articles I:1 and III:4 of the GATT 1994 and Articles 2.1, 2.2 and 2.4 of the TBT Agreement.